No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CARLOS PAGAN SAN MIGUEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the evidence was sufficient to support the conviction of Petitioner beyond reasonable doubt under the "carry prong" of §924 (c)(1) as charged in Count Four of the indictment.

Whether the court of appeals in sustaining the conviction under Count Four (1) relied upon facts not in evidence and inferences without adequate evidentiary basis, (2) ignored evidence which clearly precluded inferences essential to prove the charge, and (3) misapplied a flawed standard in evaluating the sufficiency of the evidence.

Whether plain error was committed where the trial judge omitted the statutory language "in relation to", an essential element of the offense under §924(c)(1), and gave no supplementary instruction requiring that the government prove some relation between the firearm and the predicate offense.

Whether plain error was committed when the statutory language, "in relation to", was substituted by the obsolete language "during the commission of" with the effect of broadening the scope of the conduct which Congress intended to reach under §924(c)(1).

Whether plain error was committed where in addition to the omission of the relational element under §924(c)(1), the court also erroneously instructed the jury that to establish carry (in a non-vehicle case) the firearm need not be "within reach" of the offender.

Whether the carrying of a firearm away from the site of a terminated drug offense to avoid its detection by the police comes within the scope of the "carry" prong of §924(c)(1).

Whether the failure to charge the relational element under §924(c)(1) where (1) the defendant was charged and convicted of three distinct drug offenses, (2) the §924(c)(1) count was referenced to only one of the charged offenses and (3) the government's evidence linked the firearm to the other two offenses, exposed the defendant to a conviction for a crime not charged in the indictment requiring reversal under a plain error

analysis.

Whether a mistrial should have been declared when one of the defense attorneys told the jury in summation that some of the defendants may be guilty of some of the charges in the indictment.

Whether plain error was committed by the trial judge in permitting the unsupervised read-back of testimony by the court reporter to the jurors in the jury deliberating room and in failing to first obtain the personal waiver of the incarcerated defendant's right to be present.

RULE 14, 1(b) STATEMENT

Parties in the proceedings below (1st Circuit No. 92-1973) not listed in the caption: Julio Luciano Mosquera, Raul Lugo Maya, Rafael Pava Buelba, and Edgar Gonzalez Valentin.

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October Term, 1995

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v.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CARLOS PAGAN SAN MIGUEL, hereinafter "Petitioner" or "Pagan", through his undersigned attorney, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the panel of the court of appeals (App., *infra*, A1-A26) is reported at 63 F3d 1142. The order denying the petitioner for rehearing and the suggestion for rehearing in banc is reprinted at App., *infra*, A27.

JURISDICTION

The court of appeals entered it judgment on August 28, 1995 (App., *infra*, A1) and entered its order denying rehearing and suggestion for rehearing in banc on November 29, 1995. (App., *infra*, A27) On January 24, 1996 the time within which to file a petition for a writ of certiorari in this case was extended by Justice Souter to and including April 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The district court had jurisdiction under 18 U.S.C. §3231 and the court of appeals under 28 U.S.C. §1291.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Amendments V and VI of the United States Constitution.

2. Title 18 U.S.C. §§924(c)(1); 2(a); 3231.
   Title 21 U.S.C. §§952; 960; 963.
   Title 28 U.S.C. §§1254(1); 1291.

3. Federal Rules of Criminal Procedure, §§52(b) and 43.

4. Federal Rules of Appellate Procedures, §10(e).

The complete text or pertinent parts thereof except for the Statutes involving jurisdiction are set forth in App., *infra*, A30 - A31.

STATEMENT OF THE CASE

In January of 1991 codefendant Oscar Montalvo, a/k/a, Oscar Fontalvo, came from Colombia to conduct cocaine trafficking operations in Puerto Rico. During early February of that year he began to recruit a group of individuals to carry out the air-to-sea cocaine importation scheme charged in this case. TT 3/12/92, p. 82-87[1]

Oscar Fontalvo initially recruited Carlos Pagan San Miguel[2] and Perez Perez to assist him in the Puerto Rico phase of the operation. Pagan's chief role was to receive the cocaine and safeguard it until delivered to the ultimate buyer in Puerto Rico. TT 3/13/92, p. 43

Pagan referred Soltero Lopez, owner of the fishing boat "Marlyn" to Fontalvo. Soltero Lopez agreed with Fontalvo to provide the Marlyn and its captain Castillo Ramos to pick up the

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[1] TT: Refers to Trial Transcript followed by date and page numbers.

[2] Hereinafter Carlos Pagan San Miguel shall be referred to as "Petitioner" or "Pagan" and the codefendants by their surnames only.

cocaine at sea off the coast of the Dominican Republic and transport it to the west coast of Puerto Rico. (TT 3/3/92, pp. 4-6, 10-15) Castillo Ramos recruited his crew members, Rodriguez Baez and Nunez Rodriguez to assist him. TT 3/12/92, pp. 85, 87

The remaining participants were Pava Buelba, assigned by the Colombian owners to watch the cocaine (TT 3/12/92, p. 98) and Gonzalez Valentin, Lugo Maya and Luciano Mosquera who participated in the off-loading operation in Puerto Rico.

In the morning of March 26, 1991 the Marlyn rendezvoused with the aircraft at approximately 10:30 a.m. near the northeast coast of the Dominican Republic. Eight bales of cocaine were dropped from the aircraft and retrieved by Castillo Ramos, his crew and Pava Buelba who was on board. TT 3/3/92, pp. 55 - 59

The Marlyn transported the bales of cocaine to Buoy No. 8, approximately eight miles off the west coast of Puerto Rico, arriving there at approximately 12:30 to 1:30 a.m. on March 27, 1991. TT 3/4/92, p. 14

Two small boats (yawls) manned by three codefendants met the Marlyn at Buoy No. 8 where the eight bales of cocaine and codefendant Pava Buelba were taken aboard. The two yawls, each with two men aboard, then separated from the Marlyn and headed toward shore. TT 3/4/92, pp. 15 - 17

The beach area selected for the offloading was large enough to contain a sandy strip approximately 20 feet wide (TT 3/10/92, p. 20) and several buildings south of State Highway 102 which ran parallel to the shoreline. (TT 3/11/92, pp. 52, 53) The buildings included a gas station, a house occupied by Petitioner's father, and a multiple family dwelling. (TT 3/11/92, pp. 62, 63) There were numerous abandoned car parts, rocks, debris and construction material strewn about which made passage through the grounds hazardous in the dark. TT 3/10/92, pp. 28, 30

Unknown to the participants, law enforcement agents had been monitoring the operation by radio and visual surveillance continuously since the time that the bales were dropped in the ocean. (TT 3/11/92, pp. 3 - 9; TT 3/11/92, pp. 51 - 53; TT 3/11/92, p. 74) It was a moonlit night. (TT 3/9/92, p. 106) Agents surveilling the offloading, aided by night vision

binoculars, observed that there were two individuals in each of the two yawls approaching the beach and two others fitting the description of Petitioner and Luciano Mosquera approaching the yawls from shore. TT 3/11/92, pp. 6, 7

Upon landing at approximately 2:30 a.m., the four individuals aboard the yawls and the two on shore proceeded to swiftly offload the bales and carry them from the shore towards the houses located on the higher ground near the highway. TT 3/11/92, pp. 54, 55; TT 3/11/92, pp. 6 - 8

Within moments flares were ignited above the off-loading site and the six individuals dropped the bales of cocaine and ran for cover, leaving the bales forming almost a straight line from the shore to the area near the entrance to one of the houses. TT 3/10/92, p. 53

Almost simultaneously with the igniting of the flares, 40 to 50 agents moved in to arrest the defendants and seize the cocaine. (TT 3/11/92, pp. 30-33) Perez Perez, Lugo Maya, Gonzalez Valentin, and Petitioner were arrested within moments. The other two, Pava Buelba and Luciano Mosquera, were found under a jeep which was parked along with other vehicles in an open carport adjoining a multiple family dwelling, approximately 45 minutes after the flares were lit. (TT 3/11/92, pp. 11, 12, 37) A loaded M-16 rifle, the subject matter of Count Four, was found lodged in the undercarriage of the same jeep after Pava Buelba and Luciano Mosquera had been removed. TT 3/10/92, p. 71

No evidence was adduced that any of the defendants charged in Count Four carried or possessed the M-16 rifle at any time that the importation drug offense was in progress nor was the jeep in anyway connected to the defendants prior to the arrests of Luciano Mosquera and Pava Buelba. App., *infra*, A9

The only evidence connecting the M-16 rifle to any of the defendants prior to March 27, 1991 was the testimony of cooperating witness Fontalvo who stated that the rifle had been shown to him by Perez Perez and Petitioner during the venture at the home of Gonzalez Valentin. App., *infra*, A28-A29

The indictment in this case contained five counts. In the first three counts the Petitioner and the other ten codefendants were

charged as follows:

Count One: During the early part of March, 1991 to and including March 27, 1991, the defendants knowingly participated in a conspiracy to import in excess of five kilograms of cocaine into the United States in violation of 21 U.S.C. §§952, 960, 963.

Count Two: From on or about March 26, 1991, up to and including March 27, 1991, the defendants, aiding and abetting each other imported approximately 232.8 kilograms of cocaine into the United States in violation of 21 U.S.C. §952 and 18 U.S.C. §2.

Count Three: On March 27, 1991 in the District of Puerto Rico the codefendants, aiding and abetting each other, possessed approximately 232.8 kilograms of cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2.

In Counts Four and Five Petitioner and five other codefendants, Perez Perez, Pava Buelba, Gonzalez Valentin, Lugo Maya and Luciano Mosquera, were charged as follows:

Count Four: On or about March 27, 1991 in the District of Puerto Rico, the defendants, aiding and abetting each other, did knowingly carry a fully loaded M-16 automatic submachine gun during and in relation to a drug trafficking crime: Importation of drugs into the United States as charged in Count Two, in violation of 18 U.S.C. §§924 (c)(1).

Count Five: The same charge as Count Four except that the firearm charged was a fully loaded semi-automatic pistol.

Petitioner was convicted under all five counts. As a result of a defense post-conviction motion, the fifth count was dismissed upon double jeopardy grounds.

On July 28, 1991 the defendant was sentenced to serve 360 months to life as to the first three counts and to serve 30 years as to the fourth count both jail terms to run consecutively for a total of 60 years incarceration without parole. App., *infra*, A5

REASONS FOR GRANTING THE WRIT

(1) The decision of the court below is in conflict with decisions of this Court holding that the Due Process Clause of the Fifth Amendment protects an accused against conviction except upon proof of every fact necessary to constitute the crime with which he is charged.

(2) Contrary to decisions of several courts of appeals, the court below sanctioned a jury charge under the "carry" prong of §924(c)(1) which misstated the applicable law and relieved the government of its obligation to prove the "in relation to" element in that statute, allowing the jury to convict upon a finding of mere possession.

(3) The court below erroneously held that plain error was not committed by the trial court in omitting an essential element of the criminal offense in its charge to the jury although the evidence was weak and the defendant could have been acquitted under a proper charge.

(4) In failing to consider the severity of punishment in this case, a total of 60 years of non-parolable incarceration or the equivalent of life in prison without parole, as a factor in its plain error analysis, the decision of the court below was inconsistent with the reasoning in *Fisher v. United States*, 328 U.S. 463, 467-68 (1946) and *United States v. Hudson*, 564 F2d, 1377, 1380 n.3 (9th Cir.1977).

(5) This case presents an opportunity for this Court to clarify the meaning of "carry" under 924(c)(1), an important issue which ought to be addressed by this Court. In the aftermath of *Bailey v. United States*, 116 S.Ct. 501 (1995), which narrowed the scope of the "use" prong to "active employment", serious questions concerning grossly disproportionate punishment will arise.

Under the present interpretation of "carry" and "use", in the absence of "active employment", an offender, who carries a firearm to an active drug storage site for protection of the drugs, is subject to punishment of up to 30 years of non-parolable incarceration, while an offender who maintains the weapon at the site where it is most likely to be used will get no punishment.

The need for clarification of the "carry prong" is also evident from the manner that it was misapprehended and misapplied by

the courts below in this case: The trial judge gave a contradictory charge requiring that the firearm be carried while in actual possession although not necessarily "within reach"; and the court of appeals concluded that the "carry" prong reaches the offender who "carries" a firearm from the site of a drug offense after the offense is terminated to avoid detection of the firearm.

Errors committed by the court below denied the Petitioner substantial rights guaranteed under the Due Process Clause of the United States Constitution.

SUMMARY OF PETITIONER'S CONTENTIONS UNDER ARGUMENT I, *INFRA*

The evidence relied upon by the court of appeals was insufficient to permit a reasonable inference that any of the six codefendants charged in Count Four carried the M-16 rifle during the predicate offense. Accordingly, the evidence was insufficient to sustain the Petitioner's conviction under Count Four as a principal or as an abettor.

The importation of cocaine charged in Count Two occurred during a period of almost 19 hours commencing on March 26, 1991 and extending into March 27, 1991 at 2:35 a.m. when it was aborted. However, Count Four charged the carrying of the rifle only during the last two hours and 35 minutes of the importation on March 27, 1991.

No direct evidence was introduced that any of the codefendants charged under Count Four ever carried, possessed, or handled the M-16 rifle during that period of time or at any other time while the importation was in progress.

The evidence concerning the M-16 rifle was limited to the following: (1) The discovery of codefendants Luciano Mosquera and Pava Buelba hidden under a jeep 45 minutes after the interdiction and the subsequent discovery of the M-16 rifle after a flashlight search in the undercarriage of the same jeep; and (2) the showing of the same rifle to codefendant Fontalvo by Petitioner and codefendant Perez Perez at the house of Gonzalez Valentin approximately three weeks earlier.

As links in the circumstantial evidence chain, the foregoing

historical facts were fatally weakened by the following additional evidence on the record: (1) Police officer testimony established that all six codefendants, including Luciano Mosquera, were under observation before, during and after the interdiction and none was observed to be carrying a rifle. Any reasonable inference that Luciano Mosquera carried the rifle as he ran for cover under the jeep was precluded by the evidence; (2) No discussion was held among the codefendants when the M-16 rifle was shown to Fontalvo in early March, or at any other time, concerning a role for the M-16 in the venture; (3) There was no evidence as to the whereabouts of the rifle during the time that it was shown to Fontalvo and the time that it was discovered under the jeep; (4) No evidence was adduced to connect the defendants to the jeep in which the M-16 was found or to establish when the jeep was parked where it was found, or when and by whom the M-16 was placed in the jeep; (5) The M-16 was found in an area remote from the off-loading site, which was accessible to the public but not easily accessible to the codefendants during the offloading of the cocaine; (6) Voluminous evidence which precluded a reasonable inference that the defendants intended that the M-16 play a role in the importation phase of the venture was ignored by the court below.

It follows from the foregoing analysis that the discovery of Luciano Mosquera hidden under the same jeep in which the M-16 rifle was subsequently found constituted a "mere modicum" of evidence insufficient to sustain a reasonable inference that Pagan or any other codefendant charged under Count Four carried the M-16 rifle during and in relation to the predicate drug offense.

Moreover, if, as the court of appeals concluded, the evidence was sufficient to prove that Luciano Mosquera picked up the M-16 rifle from somewhere on the beach after the interdiction and carried it under the jeep to hide it from the police, the evidence would still not suffice for conviction under Count Four since the "carrying" would not have taken place while the importation was in progress.

To justify the jury verdict of conviction under Count Four the court below (1) relied upon a "mere modicum" of evidence and upon facts not in evidence (2) drew inferences unsupported by an adequate evidentiary basis (3) ignored evidence which precluded a finding that the M-16 was carried by any codefendant during

the importation offense, and (4) applied a flawed evidentiary standard to determine the sufficiency of the evidence.

ARGUMENT

I. Affirmance Of The Jury Conviction Under Count Four In The Absence Of Sufficient Evidence To Prove Every Element Of The Crime Charged Therein Beyond Reasonable Doubt Violated Petitioner's Fifth Amendment Due Process Rights.

(A) Preliminary Statement

"The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 US 358, 364 (1970).

This Court has also held that in considering challenges to sufficiency of the evidence, the federal courts have a duty to examine the entire record to assess the historical facts and determine not only whether there was no evidence to support the conviction but whether the evidence was insufficient to justify a rational trier of facts in finding guilt beyond a reasonable doubt. Jackson v. Virginia, 443 US 307, 313 (1979)

Petitioner was charged under Count Four of the Indictment with "carrying" (the "use" prong was not charged), or aiding and abetting the carrying, of an M-16 automatic rifle (machine gun) during and in relation to a drug trafficking crime, in violation of 18 U.S.C. §924(c)(1) and 18 U.S.C. §2(a).

Section 924(c)(1) provides, in pertinent part:

> Whoever, during and in relation to any ...drug trafficking crime...uses or carries a firearm, shall, in addition to the punishment provided for such ...drug trafficking crime, be sentenced to imprisonment for five years...and if the firearm is a machine gun...to imprisonment for thirty years....

Section 2(a) provides: "Whoever commits an offense against

the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Mere actual possession, e.g., carry on one's person, is not sufficient to subject a defendant to the punishment required by §924(c)(1), the possession must be while the predicate crime is in progress and cannot be unrelated to the offense, i.e., the firearm must facilitate or have the potential of facilitating the predicate crime. Smith v. United States, 113 S.Ct. 2050, 2059 (1993)

District Court charged the jury that to prove "carry" the government was required to prove beyond a reasonable doubt actual possession of the firearm as opposed to constructive possession, which the Court stated did not apply where the charge was "carry", and defined actual possession as: "direct physical control and dominion over a thing at a given time." TT 3/19/92, pp. 27, 33

Counts One, Two and Three of the indictment charged three distinct drug offenses. The M-16 rifle was referenced only to the importation offense in Count Two.

Therefore, to convict Pagan of carrying the M-16 rifle in violation of §924(c)(1) in this case the government was required to prove beyond a reasonable doubt that the M-16 rifle was carried by Petitioner while under his direct physical control (actual possession), (App., *infra*, A14) or by one of the other defendants charged under Count Four aided by Pagan, while the drug importation charged under Count Two was in progress, and that the carrying of the rifle facilitated or had the potential of facilitating the importation of drugs charged.

Although the importation of drugs charged in Count Two commenced on March 26, 1991 at approximately 8:00 a.m. and ended on March 27, 1991 when it was aborted at 2:35 a.m., Count Four charged that the rifle was carried in violation of §924(c)(1) on one day only, March 27, 1991. Thus the government in effect limited the temporal dimensions of the offense charged in Count Four to a period of two hours and 35 minutes on March 27, 1991.

Count Four charged carrying of the rifle "on or about" March 27, 1991. However, the fact that Count Two charged that the

importation of cocaine occurred on March 26th and March 27, 1991 and that the same period of time was not carried over to Count Four indicates that the grand jury intentionally limited the §924(c)(1) charge to the two hours and 35 minutes period that the importation offense extended into March 27, 1991. Petitioner had the right to rely on the statement of the charge as noticed in the indictment.

Proof beyond reasonable doubt that Pagan or any other codefendant carried the M-16 rifle during the early stages of the conspiracy charged in Count One or that the M-16 rifle had been transported to the beach area and kept there for future use as protection for the cocaine while in storage, does not suffice for a conviction under §924(c)(1) which requires that the firearm be carried during and in relation to the predicate crime and not to other drug offenses charged in the indictment. *See* ¶ II (B), *infra.*

No direct evidence was introduced to prove that Luciano Mosquera, Petitioner or any other codefendant carried or actually possessed the M-16 rifle during the time period charged in Count Four and, considered in its totality, in the light most favorable to the verdict, the circumstantial evidence was insufficient to permit a rational jury to draw such an inference.

The court below initially conceded the absence of direct evidence to support the conviction under Count Four in its findings that:

> **"No weapons were seen during the observation of the offloading operation and no weapons were found on any of the defendants. There had been no weapons on the F/V Marlyn. Neither Luciano-Mosquera nor Pava-Buelba had arrived at the beach by jeep. There was no evidence as to who owned the jeep or how the jeep got there."** App., *infra*, A5

> **"Still, the gun was not found in the hands of anyone at the beach and there is no direct evidence as to who carried the gun. None of the agents watching the off loading saw anyone with a weapon of any kind."** App., *infra*, A10

Nevertheless, the court affirmed the conviction against Pagan under Count Four upon its erroneous conclusion that the circumstantial evidence was sufficient to establish beyond a reasonable doubt that Luciano Mosquera, aided and abetted by Pagan, carried the M-16 from the beach to the jeep after the flares were ignited. App., *infra*, A12

(B) In Sustaining Petitioner's Conviction Under Count Four, The Court Of Appeals (1) Relied Upon Facts Not In Evidence And Inferences Without Adequate Evidentiary Basis And (2) Ignored Evidence On The Record Which Precluded Inferences Essential To Prove Every Element Of The §924(c)(1) Charge In Count Four Of The Indictment.

We examine under this sub-argument the major historical facts and inferences drawn by the court of appeals in reaching its findings and its conclusion that the evidence on the record was sufficient to sustain Petitioner's conviction under Count Four of the indictment beyond reasonable doubt.

(1) The Court's Preliminary Findings:

"The conclusion is reasonable that at least one Puerto Rico based participant in the drug conspiracy physically carried the M-16 to the beach. The M-16 had been at Gonzalez Valentin's house a few days before the beach landing. It was then found in the undercarriage of the jeep in a carport near the beach....Someone brought it from Gonzalez Valentin's house to the jeep." App., *infra*, A9 (Emphasis Added)

(a) The Court's finding that the M-16 rifle was at Gonzalez Valentin's house a "few days" before the landing was speculative and contrary to the evidence. According to the evidence the rifle had been seen by Fontalvo at Gonzalez Valentin's house approximately three weeks before the landing.

The only direct evidence connecting the M-16 rifle to any of the defendants prior to March 27, 1991 was Fontalvo's testimony that the same rifle had been exhibited to him by Petitioner and Perez Perez at Gonzalez Valentin's house "originally when the boat arrived in port." (App., infra, A28) The government did not establish the date when the Marlyn originally arrived in port nor

the date of the incident at Gonzalez Valentin's house. (App., infra, A28-A29) However, other testimony on the record compels the conclusion that the Marlyn could not have "originally arrived in port" a few days before the landing but at some time between March 3, 1991 and March 9, 1991, approximately three weeks before the landing.

Fontalvo testified that he had seen the Marlyn some time between March 3 and March 6, 1991 (TT 3/12/92 p.102) and Castillo Ramos, the Marlyn captain, testified that he had brought the Marlyn to Puerto Rico from a fishing trip on March 9, 1991 and had departed for the Dominican Republic on March 11, 1991 (TT 3/3/92, pp.4, 28, 30) He returned to Puerto Rico with the cocaine on March 27, 1991.

It follows conclusively from the testimony of Castillo Ramos that the Marlyn could not have arrived in Puerto Rico during the eighteen-day period of March 10, 1991 to March 27, 1991. Accordingly, the incident during which Fontalvo saw the rifle at Gonzalez Valentin's house, if it took place when the Marlyn "originally arrived in port" as he testified, could not have occurred a few days before the landing as the court below concluded but approximately three weeks before the landing.

(b) The Circuit Court's findings that "one Puerto Rico based participant in the drug conspiracy physically carried the M-16 to the beach" and that "someone brought it from Gonzalez Valentin's house to the jeep" are without any evidentiary basis on the record.

No direct evidence was adduced that the M-16 rifle was carried by any of the codefendants to the beach area during the 19 hour period that the importation was in progress.

There was no evidence that the M-16 rifle was left at Gonzalez Valentin's house after it was exhibited to Fontalvo in early March and no evidence as to its whereabouts during the almost three weeks that followed before it was found on March 27, 1991.

Since there was no adequate evidentiary basis from which a reasonable inference could be drawn that the M-16 rifle remained at Gonzalez Valentin's house after it was exhibited to Fontalvo--a fortiori--no reasonable inference could have been drawn that the

M-16 rifle was carried by one of the participants from Gonzalez Valentin's house to the jeep.

(c) Moreover, the court of appeals failed to consider Fontalvo's detailed descriptions of the events of March 26, 1991 prior to the landing, which clearly negate any reasonable inference that one of the codefendants carried the M-16 to the beach as the Court concluded.

Fontalvo testified that on March 26, 1991 he was at Gonzalez Valentin's house or at a restaurant across the street from Valentin's house from 8:00 a.m. to approximately 8:00 p.m. participating in various activities at various times during the day with codefendants Pagan, Perez Perez, Luciano Mosquera and Gonzalez Valentin in preparation for the arrival of the cocaine but did not claim to have seen any of the defendants handling the M-16 rifle during that day:

During the morning hours, Fontalvo was with Pagan and Perez Perez at Gonzalez Valentin's house waiting for a radio communication and was present when Perez Perez and Pagan left Gonzalez Valentin's house for a while and when they returned; At approximately 4:30 in the afternoon he drove Perez Perez and Gonzalez Valentin to the fish market where they were to pick up the two yawls to go out to Buoy No. 8 to pick up the bales of cocaine; He saw Luciano Mosquera at Gonzalez Valentin's house in the afternoon of March 26, 1991. At that time Luciano Mosquera lent his pick up truck to Pagan who drove it away; When Pagan failed to return at approximately 8:00 p.m., Fontalvo drove Luciano Mosquera to the beach area so that he could retrieve his pick-up from Pagan. TT 3/13/92, pp. 35 - 38;

Since Fontalvo was the organizer of the operation and had seen the M-16 rifle before, there was no reason for Pagan or the other codefendants to conceal the M-16 or its intended use from him. Nevertheless, no testimony was elicited from Fontalvo that the M-16 rifle was at Gonzalez Valentin's house on March 26, 1991 nor that any of the codefendants carried or handled the rifle during that day.

(2) The findings underlying the conclusion that the M-16 rifle was carried during the predicate crime:

The Court below concluded that some time before the arrests the rifle was somewhere on the beach and was then brought from the beach and placed under the jeep to avoid detection, and further, that it was Luciano Mosquera who brought the rifle from the beach and hid it under the jeep as he was hiding from the police or at some time before the arrests. App., *infra*, A11

The court said that its conclusion that the M-16 was brought from the beach to the jeep was based upon the fact that the jeep was not connected to the defendants. (*Id.* at A8) How the Court logically justified such a gigantic inferential leap was not explained.

The inference was nevertheless impermissible since it was based upon a fact not in evidence. The jurors had no evidence before them from which to conclude that the jeep was not connected to the defendants since no such evidence was introduced by the government.

(a) The evidence overwhelmingly established that the M-16 rifle was never in the actual possession of any of the codefendants charged under Count Four on the beach during March 27, 1991.

Lugo Maya and Pava Buelba: As to these codefendants the issue need not be addressed here since the court below held that the evidence was insufficient to sustain their convictions under Count Four and reversed their convictions. App., *infra*, A12

Perez-Perez and Gonzalez Valentin: These codefendants were in the yawls at sea during the relevant time, and there was no evidence adduced that the M-16 was carried in the yawls. Within minutes after the landing the two were arrested in areas remote from the jeep where the M-16 rifle was found and they were never observed to have been carrying a rifle after the landing. TT 3/9/92, pp. 105 - 08

Luciano Mosquera and Pagan: They were the only codefendants at the beach prior to the landing. No direct evidence was introduced to prove that either possessed, carried or handled the M-16 rifle while the importation was in progress.

The court below ignored the following evidence which precluded any inference that either Luciano Mosquera or Pagan

carried the M-16 rifle on the beach on March 27, 1991:

Since approximately 11:00 p.m. on March 27, 1991, to the time of the arrests, three experienced police agents, alert to the presence of unfriendly firearms, conducted surveillance within the beach area. (TT 3/12/92, p.47) Under a moonlit sky and aided by the use of night vision binoculars they monitored Pagan and Luciano Mosquera as they walked on the beach to meet the two inbound yawls to assist in the offloading and they observed no rifle in their possession. TT 3/11/92, pp. 3 - 8

When the flares were ignited the six codefendants were in the process of offloading the eight bales of cocaine at the shore and carrying them up to the higher ground towards the houses near the road and none was observed carrying a rifle. TT 3/11/92, p.8

The bales of cocaine were bulky and each weighed at least 64 pounds.[3] Experience and common sense dictate that a normal man would need to use both arms and hands to carry one of the bales up hill over hazardous terrain in the dark and that it was highly unlikely that the M-16 rifle and two magazines would be carried simultaneously with a bale of cocaine.

Under bright illumination the beach area was quickly saturated by approximately 40 to 50 agents who proceeded to arrest the defendants and seize the cocaine. TT 3/11/92, p. 74

All six codefendants were observed as they abandoned the bales of cocaine and ran for cover. (TT 3/11/92, p. 8) Petitioner was observed while running and was arrested within moments as he sought cover under the carcass of an abandoned Volkswagen. He was not observed to be carrying a rifle and was not arrested near the area where the M-16 was found. TT 3/12/92, pp. 47-57

(b) The discovery of Luciano Mosquera hidden under the same jeep in which the M-16 rifle was subsequently found provided a "mere modicum" of evidence insufficient under the circumstances of this case to sustain a reasonable inference that he carried the rifle from the beach to the jeep after the arrest:

[3] The total weight of the cocaine contained in the eights bales was 232.8 kilos net (TT 3/12/92, p. 74) approximately 513 pounds or 64 pounds per bale plus the weight of the wet canvas and plastic wrappings.

As this court expressed in *Jackson v. Virginia*, supra, at 320:

> "Any evidence that is relevant - that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf., Fed. Rules Evid. §401,could be deemed a "mere modicum". But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt".

Although Luciano Mosquera was discovered approximately 45 minutes after the arrest signals hiding under the same jeep in which the M-16 rifle was found, no reasonable inference may be drawn that he carried the rifle with him as he ran for cover under the jeep as the Court below concluded.

To begin with there was no direct evidence to prove that the rifle was within the undercarriage of the jeep at the same time that Luciano Mosquera was discovered hiding under the jeep. The government did not establish the time lapse between the arrest of Luciano Mosquera and the discovery of the rifle nor that the jeep was safeguarded during that time lapse. (TT 3/10/92, p.71) Even if the inference that the M-16 rifle was stored under the jeep when Luciano Mosquera was discovered is found to be reasonable under the circumstances, the further inferences that Luciano Mosquera had placed the M-16 there before the arrests, that he knew that the M-16 rifle was there when he hid under the jeep, or that he was carrying the rifle when he hid under the jeep, were not.

The only inference that flows naturally from the evidence on the record is that the M-16 rifle was not carried by Luciano Mosquera as he ran for cover under the jeep.

When the flares were suddenly ignited above the heads of the six defendants, they all rushed for cover seeking protection or a place to hide (App., infra, A4). Common sense dictates that instinctively, the participants rushed to the nearest cover.

The presence of bales of cocaine near the carport where the jeep was parked (TT 3/11/92, pp. 11, 12) strongly suggests that Luciano Mosquera dropped one of those bales and quickly

sought cover under the jeep because it was parked nearby and easier to slip under than a conventional automobile.

Experience and common sense again dictate that Luciano Mosquera would not have wasted precious time looking for the M-16 rifle in the dark so that he could take it along to a hiding place.

(3) The specific findings underlying the conclusion that the rifle was carried during and "in relation to" the predicate crime:

In support of its conclusion that the circumstantial evidence was sufficient to sustain a finding beyond a reasonable doubt that the "carrying" of the M-16 rifle (allegedly by Luciano Mosquera) was "during and in relation to" the importation of drugs charged in Count Two, the court of appeals relied upon the following findings: (1) that the weapon was found in close proximity to the off-loading operation, (2) that ammunition was found nearby, (3) that the rifle was brought to a "planning meeting" and shown off, and (4) that the rifle was found close to the bales of cocaine. App., infra, A12

(a) The first three findings relied upon by the Court are not supported by the evidence.

Finding "(1)": The M-16 was not found in close proximity to the off-loading operation. The bales were off loaded at the seashore while the two yawls were still partially in the water. The M-16 rifle was discovered approximately 45 minutes later, in a separate area a considerable distance away, in a jeep that was parked in a carport adjacent to a multiple dwelling.

Finding "(2)": Ammunition was not found "nearby" the off-loading site nor "nearby" the carport where the jeep was parked. The term "nearby: is defined as "close at hand" or "adjacent", *Funk & Wagnalls New Comprehensive International Dictionary of the English Language, Encyclopedia Edition, The Public Guild, Inc., NY (1973).*

Although the record is not clear as to exact location, it is fair to conclude that two magazines with ammunition were found within four to five feet of each other at the "other end" or "side" of the house with the adjoining carport where the jeep was found near

the bales of cocaine. (TT 3/12/92, pp. 37, 38) It is clear, however, that the area where the magazines were found was not "close at hand" or "adjacent" to either the off-loading site or to the carport.

Finding "(3)": The M-16 rifle was not shown at a "planning meeting" by the conspirators. The only evidence adduced concerning the showing of the M-16 rifle came through the testimony of Fontalvo who never testified that a meeting was in progress when the M-16 rifle was shown to him at Gonzalez Valentin's house nor that any conversation was held at that time concerning any plans for the drug importation venture. App., *infra*, A28-A29

Finding "(4)": The rifle's proximity to the bales of cocaine, without more, is too remote a link to sustain a reasonable inference that the rifle was carried by one of the codefendants during and in relation to the commission of the predicate crime on March 27, 1991, particularly in the absence of any evidence concerning the date and time when the jeep was parked where it was found, the date and time when the M-16 was placed in the jeep and the identity of the individual who placed it there.

(b) There was insufficient evidence adduced to prove that the codefendants intended to carry the M-16 rifle in relation to the importation offense.

The court of appeals did not refer to any evidence from which a reasonable inference could have been drawn that the participants intended to use the M-16 in relation to the importation offense. It did not go beyond citing language from the legislative history of the 1984 Amendment to §924(c)(1) stating that "...liability would lie if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape", without alluding to any evidence on the record that would justify the application of such an evidentiary standard in this case. App., *infra*, A12

The language quoted refers to a hypothetical case, distinguishable from the case at bar, in which the carrying of the weapon on the person during the commission of the predicate offense and the defendant's intention to use the gun if a contingency arose or to make his escape are established. *S.Rep.*

No. 225, 98th Cong., 2d Sess. 1, 314 n.10 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3492 n.10.

In this case a contingency arose and the firearm was not used for any purpose by any of the defendants.

(c) Voluminous evidence on the record that clearly precluded any reasonable inference that the codefendants intended to use the M-16 rifle to assist them in the importation of the cocaine offense was erroneously ignored by the court of appeals.

If the M-16 rifle had been intended to play a role in the predicate offense, it would have been available for use by the codefendants on the vessels in which the bales were transported to the beach in Puerto Rico or immediately accessible for use on the shore where the bales of cocaine were off loaded from the yawls. No such evidence was adduced by the government.

Fontalvo, the prime organizer of the the venture and Castillo Ramos, the captain of the Marlyn, who transported the bales of cocaine to Puerto Rico testified at length during the trial as cooperating witnesses for the government. Neither witness mentioned any plans or conversations concerning the use of the M-16 rifle during any phase of the operation. Castillo Ramos testified that no one ever spoke to him of firearms and that there were no firearms in the Marlyn during the importation. TT 3/4/92, pp. 74, 77

No discussion was held concerning any intended use of the M-16 rifle when it was shown to Fontalvo at Gonzalez Valentin's house in early March. App., *infra*, A28-A29

The following clearly established that the M-16 rifle would have been of no practical use to the defendants during the off-loading operation: (1) There was no evidence adduced that the defendants anticipated any hostile interference at the beach area during the offloading of the cocaine from police agents or rival drug traffickers necessitating the posting of an armed sentry at the beach; (2) The offloading of the bales was to take place in the dark of night in a beach area which was not closed to the public and which was heavily strewn with abandoned car parts, construction materials, rocks, bushes, etc., which made it difficult to traverse at night, and (3) The rifle was not easily concealable

and of limited effectiveness as a protective or offensive weapon in the dark. Moreover, since the heavy and bulky bales had to be off loaded and carried quickly to cover by all six codefendants through hazardous terrain in the dark, the simultaneous carrying of the M-16 rifle would have been an unnecessary additional burden.

The alternative inference suggested by the court below that Luciano Mosquera had stored the M-16 rifle in the undercarriage of the jeep some time before the offloading, an inference not permissible due to lack of an evidentiary basis, would have made the M-16 rifle unavailable to the participants during offloading--another clear indication of the participants' lack of intent to use the M-16 rifle in relation to the importation offense.

(C) The Court Of Appeals Failed To Distinguish Between The Components, "Carry" And "Use" Under §924(c)(1) And Erroneously Applied The So Called "Drug Fortress" Standard To Evaluate The Sufficiency Of The Evidence Under Count Four Although "Use" Was Not Charged In This Case.

In the typical "drug fortress" case, such as the case cited in the opinion below, *United States v. Paulino*, 13 F3d 20 1st Cir. (1994), the charge was "use" under §924(c)(1) and the predicate crime, possession of drugs with intent to distribute, a continuing crime. *See also United States v. Hadfield*, 918 F2d 987 (1st Cir.1990) Actual possession of the weapon was not required and the "use" prong could be established by mere presence of the firearm in close proximity to drugs, drug proceeds or drug paraphernalia. This evidentiary standard which had been followed by most circuits was rejected by this Court in *Bailey v. United States*, supra.

Although the four findings discussed in ¶I (B) (3), supra, were ostensibly relied upon by the court below as circumstantial proof of the fact that Luciano Mosquera carried the M-16 on the beach during the importation offense, it is clear that the same evidence was more strongly probative of the fact that the M-16 was stored close to the bales of cocaine intended for future use in protecting the stash of cocaine.

Storage of weapons in close proximity to drugs or to a drug

operation site where the weapons would be available to protect an ongoing illegal drug operation was the linchpin in the "drug fortress" cases applying the broad interpretation of "use" under §924(c)(1) which was rejected in *Bailey* by this Court.

The court of appeals' emphasis and strong reliance upon that factor to support the conviction under Count Four (App., *infra*, A12) lends strong support to the argument that the court erroneously applied in this case, in which the charge was "carry", a standard of sufficiency of evidence applicable before *Bailey* to cases charging "use".

Even after *Bailey* the court below appears to continue to disregard the distinction between the components "carry" and "use" under §924(c)(1).

Although the "use" component was never charged in this case, two of the judges who decided the appeal below recently decided *United States v. Bennett*, No. 94-2260, slip.op. (1st Cir. Feb.1, 1996), in which the court, referring to this case, stated: "In Luciano Mosquera, we upheld an abetting conviction because the defendant provided a house for meeting where guns were displayed and discussed, and later used during a drug trafficking crime." 63 F3d at 1150 (Emphasis added)

II. Plain Error Requiring Reversal Was Committed When The Trial Judge In Its Charge To The Jury Under Count Four (1) Omitted The Relational Element And Substituted In Its Stead Obsolete Language That Unconstitutionally Broadened The Scope Of §924(c)(1) And (2) Relieved The Government Of Its Obligation To Prove That The Weapon Had To Be "Within Reach".

(A) Omission of the relational element under §924(c)(1) was plain error requiring reversal.

As originally enacted, 18 U.S.C. §924(c) provided in pertinent part that it was a crime to "carry a firearm unlawfully during the commission of any felony". Amendments passed by Congress in 1984 and 1986 eliminated "unlawfully" and substituted the phrase "during and in relation to...a drug trafficking crime" for

the phrase "during the commission of any felony". App, *infra*, A31

The district court judge instructed the jury in its general charge that to establish the §924(c)(1) charge in Count Four the government was required to prove (1) that the defendant committed a crime of drug trafficking and (2) that during the commission of the drug trafficking crime the defendant knowingly carried a firearm. The Court omitted the "in relation to" statutory language, improperly substituted in its stead the phrases, "during the commission of" or "in the commission of" the drug trafficking offense, and gave no supplementary instruction that the government was required to prove some relationship between the firearm and the drug trafficking offense. App., *infra*, A30

The instruction was read back to the jury at their request during deliberations. At that time the court did not read back Count Four, did not elaborate beyond the read back and did not inquire of the jurors' if their quaere had been answered. TT 3/19/92, p. 53

In its only departure from the original text the court told the jury that only "two essential elements" were required to be proven (1) the commission of the underlying offense and (2) knowingly carrying the weapon during the commission of the offense. (TT 3/19/92, pp. 52 - 53) Highlighting the erroneous instruction that only those two elements were required to convict, during the critical stage of deliberation, was the equivalent of directing the jury not to consider the essential relational element under §924(c)(1).

It was well settled by this Court in *Smith v. United States*, 113 S.Ct. 2050, 2058-59 (1993), that the mere possession or carrying of a firearm during the commission of a drug crime does not trigger liability under §924(c)(1) unless the firearm played an instrumental role or was intended to play an instrumental role in the drug offense.

It is an established principle of law in our courts grounded upon Due Process rights that the omission of an essential element of a criminal offense from the jury charge constitutes plain error. *Fisher v. United States*, 328 U.S. 463, 467 - 68 (1946); *United States v. Nelson*, 27 F3d 199, 202 (6th Cir.1994); *United States v.*

Stewart, 779 F2d 538, 540 (9th Cir.1995); *United States v. Pope*, 561 F2d 663, 670 - 71 (6th Cir.1977); *United States v. King*, 521 F2d 61, 63 (10th Cir.1975)

Applying Rule 52(b), Fed.R.Crim.P., Judge (now Justice) Kennedy held in *Stewart*, supra, at P. 540:

> "The relation between the firearm and the predicate offense is an essential element of the crime and failure to instruct upon it warrants reversal where there is a significant possibility the jury might have acquired if it had considered the matter".

The court below found that the trial court relied upon obsolete statutory language in substituting the phrase "during the commission of" instead of "in relation to" the predicate crime but held, without any support on the record, that the "actual charge" given emphasized that the carrying of the firearm must be linked to the specific underlying drug offense and, that consequently, Petitioner's attack did not rise to the level of plain error. App., *infra*, A21

The following constituted the specific language from the trial court's charge relied upon by the court to support its finding:

> "First, it must be proven that a[ ] defendant[ ] committed a crime of drug trafficking for which he may be prosecuted in the United States. And second, that during the commission of the crime of drug trafficking the defendant[ ] knowingly carried a firearm." App., *infra*, A21

It is clear from that language that the trial court did not emphasize that the carrying of the firearm must be "linked" to the predicate offense.

The language quoted, and the charge in its entirety, failed to inform the jury that to convict Petitioner under Count Four beyond a reasonable doubt under §924(c)(1), the carrying of the firearm "must have some purpose or effect with respect to the drug trafficking crime", as interpreted by this Court in *Smith v. United States*, supra.

By its terms §924(c)(1) does not reach every case in which the firearm is carried "during the commission" of the predicate offense or in which the firearm is "linked" to the predicate offense, it reaches only those cases in which the firearm is carried "in relation to" the predicate offense.

The terms "during the commission of" and "linked to" are too broad to be substituted for the term "in relation to", as defined by *Smith*, supra, in a jury charge. In the absence of an instruction to the jury that the weapon must play some role in the predicate crime, weapons carried during the commission of a drug crime may be "linked" or "connected" to the drug offense in the minds of jurors based solely upon mere possession although no additional evidence is introduced to prove an intent that the weapon play a role in the predicate offense. Convictions under such circumstances are clearly beyond the scope of §924(c)(1).

(B) The Potential For Conviction Of Petitioner For Uncharged Crimes

The omission of the "in relation to" element and the substitution of the obsolete language "during the commission of" created a strong potential that the jury might have convicted Petitioner of an offense not charged in the indictment in violation of his Fifth Amendment Due Process rights. *Stirone v. United States*, 361 U.S. 212 (1960), *United States v. Willoughby*, 27 F3d 263, 265 - 66 (7th Cir.1994); *United States v. Beard*, 43 F2d 1084, 1086 - 87 (5th Cir.1971)

The indictment charged Petitioner in three distinct drug offenses: Count One - conspiracy to import cocaine into the United States; Count Two - the importation of cocaine into the United States, and Count Three - possession of cocaine with intent to distribute.

After the formal reading of Count Four, the trial judge did not again refer to the importation count as the predicate offense under Count Four in its instructions, the reference was to the "commission of the crime of drug trafficking", nor admonish the jurors not to consider for the purpose of Count Four any evidence which related to Counts One and Three.

The government's case under Count Four was built upon very

feeble circumstantial evidence--no direct evidence was adduced that any of the codefendants carried the M-16 rifle during the limited time period charged in Count Four.

There was, however, direct evidence in the case that Pagan carried the M-16 to Gonzalez Valentin's house during the early part of the conspiracy charged in Count One (App., *infra*, A28) and that the Pagan's chief role in the venture was to safeguard the cocaine after its delivery to Puerto Rico. (TT 3/13/92, p. 43)

Under the foregoing circumstances, in the absence of adequate instructions, a very strong possibility existed that the jury may have convicted Petitioner either for carrying the M-16 rifle during the commission of the conspiracy charged in Count One or for carrying the rifle to the beach for future use in safeguarding the cocaine during storage as argued by the government in summation over Petitioner's objections. (TT 3/19/92, p. 120)

Those crimes were not charged in the indictment and could not have been the basis for the conviction under Count Four. A conviction that rests, no matter how comfortably on proof of another offense cannot stand. *United States v. Willoughby*, supra, at p. 266

In *Willoughby*, supra, the defendant was charged with both possession of drugs with intent to distribute and distribution of drugs. He was also charged in a §924(c)(1) count referenced only to the distribution count. The evidence at trial proved only "use" in relation to the possession count.

In reversing the conviction under §924(c)(1), the *Willoughby Court* extensively discussed the error which arises where the proof at trial goes beyond the parameters of the indictment to establish offenses different from or additional to those charged by the grand jury, and made the following findings at p. 266 which are applicable to the case at bar:

> "...Termed a constructive amendment of the indictment, such error, which in a jury trial can also be generated or exacerbated by faulty instructions, violates the Fifth Amendment since the Grand Jury Clause limits the available basis

> for conviction to those contained in the indictment. *See Schmuck v.United States*, 489 U.S. 705, 717-18, 109 S.Ct. 1443, 1451-52, 103 L. Ed2d 734 (1989). A resulting conviction cannot stand because there is no assurance that it matches the offenses charged. It is, in other words, reversible *per se*. *See Stirone v. United States*, 361 U.S. 212, 270, 273 4 L.Ed.2d 252 (1960)." (Emphasis added)
>
> "...Thus, even if an adequate § 924(c) charge need not indicate by name a particular drug trafficking offense, by the way it framed the indictment in this case, the government narrowed the legitimate scope of the weapons charge to *Willoughby's* use of a firearm in connection with distribution of cocaine, not the mere possession with intent to distribute cocaine or "drug trafficking" generally. A conviction relying upon a link between the gun and the latter described conduct would constitute an impermissible broadening of the indictment, for its basis was necessarily excluded from the charge as phrased."

(C) Failure Of The Trial Judge To Charge That The Firearm Must Be "Within Reach" To Prove Carrying Under §924(c)(1) Affected Petitioner's Substantial Rights Of Due Process.

In defining "knowingly carrying a firearm" the trial judge instructed the jury that it was not necessary to prove that the weapon was within the defendant's reach. (App., *infra*, A30) The instruction was in conflict with the prevailing interpretation of the "carry" prong under §924(c)(1) requiring that the weapon be within reach during the commission of the predicate crime, particularly in non-vehicle context cases such as the case at bar. See *United States v. Manning*, No. 95-1199, slip.op. (1st Cir, March 21, 1996) (citing as a definition of "carry": "to move while supporting (as...in one's hands or arms...); *United States v. Pineda Ortuno*, 952 F2d 98, 103 (5th Cir.1992) citing *United States v. Feliz Cordero*, 859 F2d 250, 253 (2nd Cir.1988) (person cannot be said to carry without at least showing that the gun was within reach during the commission of a drug offense); See also

United States v. Eaton, 890 F2d 511, 512 (1st Cir.1989) citing *Feliz Cordero* with approval; *United States v. Bailey*, 36 F3d 106, 125 (D.C. Cir.1994) (Williams, J., dissenting) (carry must entail immediate availability).

There was no direct evidence in this case that the M-16 was either "carried by" or "within the reach of" any of the codefendants during the offloading operation on March 27, 1991, under a correct charge requiring proof that the weapon be "within reach" to establish guilt under §924(c)(1), Petitioner might have been acquitted as to Count Four.

III. Contrary To The Decision Below, Remarks By One Of The Defense Attorneys During Closing That Some Of The Defendants Might Be Guilty Of One Or More Of The Charges Denied Petitioner His Due Process Right To A Fair Trial.

During the charge conference one of the defense attorneys indicated that he wanted to argue to the jury that his client was guilty of the drug charges but not of the weapons charges. Upon objection by the other defense counsel claiming that the spillover effect would result in prejudice against their clients, the attorney agreed to forego the argument.

During closing, notwithstanding his assurances, the attorney made the following comment referring to all defendants:

> "And the fact that they were being charged with five different counts does not mean that you had to find them guilty or innocent or all of the same, but that you could choose and pick. And that you could discern among the evidence and determine which, if any, were guilty of any of the counts charged.
>
> Some might be guilty of one or more. Some might be guilty of none." TT, 3/18/92, p. 71

The trial judge sustained an objection by Petitioner's lawyer but denied his motion for a mistrial. The court instead offered to give a curative instruction to the jury during its regular charge.

Petitioner's counsel refused the offer, claiming that the damage to Petitioner was incurable by any instruction that the court could give. TT, 3/18/92, p. 82, 83; TT, 3/19/92 p. 45, 46

This case is unlike most cases involving antagonistic defenses in which defendants point their fingers at each other during trial. In those cases there is an opportunity to counter the prejudicial evidence through cross examination and refutal evidence.

In this case, an attorney who had been part of the defense team throughout the trial and who by virtue of his position was viewed by the jury as having inside information about the case and about the involvement of all the defendants, told the jury that some of the defendants may be guilty.

The prejudicial remark was particularly damaging since it was made during summation and would remain fresh in the juror's minds during deliberations. Moreover, due to the timing there was no opportunity for Pagan's counsel to effectively rebut.

The court below had no basis to conclude that the remarks would have no impact on the outcome of the weapons charges. (App., infra, p. 20) The motion for mistrial should have been granted to protect Petitioner's due process right to a fair trial.

IV. Contrary To The Decision Below, Plain Error Was Committed By The District Court In Permitting The Unsupervised Read-Back Of The Testimony Of A Major Government Witness By The Court Reporter In The Jury Deliberating Room And In Failing To Obtain The Petitioner's Personal Waiver Of His Right To Be Present During The Read-Back.

The defendant's right to be present embodied in Rule 43 Fed.R.Crim.P.. and guaranteed by the Confrontation Clause of the Sixth Amendment extends to every stage of the trial, *Illinois v. Allen*, 397 U.S. 337, (1970) including jury requests for additional instructions and for transcripts or read back of testimony. *United States v. Parent*, 954 F2d 23 (1st Cir.1992)

The right to be present during all stages of the trial is one of those "basic rights" that the attorney cannot waive without the

fully informed and publicly acknowledged consent of the defendant. *Taylor v. Illinois*, 484 U.S. 400,(1988), see also *Cross v. United States*, 117 U.S.App.D.C. 56, (1963) (cited with approval in *Taylor*).

In *United States v. Hernandez*,, 27 F3d 1403 (9th Cir.1994), citing *United States v. Lujan*, 936 F2d 406, 408-411, reversal was warranted where the trial court allowed the jury to review the transcript of the testimony of a witness during deliberations without taking sufficient precautions to prevent undue emphasis.

During deliberations in this case, the jury requested the read back of the testimony of witness Castillo Ramos. The trial judge consulted with the lawyers for both sides and with their acquiescence ordered the court reporter to read back the testimony to the jurors in the jury deliberating room.

No precautionary instructions were given to the jury or to the court reporter prior to the read-back. The incarcerated defendants were not consulted by their attorneys concerning the waiver of their presence during the read back nor the decision to allow the court reporter to read back the transcript without supervision in the jury deliberating room. App. *infra*, A21, A22 n.7

No record was made of the foregoing procedures. See Stipulation under Fed.R.App.P., 10(e) and affidavit of trial counsel. App., *infra*, A33 - A35

CONCLUSION

For the reasons urged herein, the Petition should be granted.

Dated: April 26, 1996
Brooklyn, NY

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APPENDIX

UNITED STATES OF AMERICA,

Appellee,

v.

CARLOS PAGAN SAN MIGUEL,

Defendant, Appellant.

Nos. 92-1973 and 94-1657.

United States Court of Appeals,
First Circuit.

Decided August 28, 1995

LYNCH, Circuit Judge.

At 2:45 a.m. on March 27, 1991, in the darkness of the night over a Puerto Rico beach, government flares brightened the sky as waiting police and customs officers surprised and arrested six men offloading eight bales of cocaine from two yawls. The men had brought 232.8 kilograms of cocaine to this country from Colombia. Others involved were arrested on land and on sea. Those arrests led ultimately to these appeals by five of the men, Carlos Pagan-San-Miguel, Edgar Gonzalez-Valentin, Raul Lugo-Maya, Rafael Pava-Buelba and Julio Luciano-Mosquera.

The appeals variously raise challenges to the sufficiency of the evidence, to limitation of cross-examination, to the admissibility of one defendant's statement, to remarks made during summation, to the reading of the transcript of trial testimony to the jury, to jury instructions, to the delay in transcribing the trial transcript, and to their sentences. Of these, only one raises serious issues--the question of the sufficiency of the evidence to support the convictions for carrying or aiding and abetting the carrying of a firearm during and in relation to the drug offense as to certain defendants.

The convictions of defendants Pava-Buelba and Lugo-Maya are reversed on the firearms count (Count 4) and their sentences on that count are vacated. We affirm their convictions and sentences on the drug counts (Counts 1-3). The convictions and sentences of defendants Pagan-San-Miguel, Gonzalez-Valentin, and Luciano-Mosquera are affirmed on all counts.

I. FACTS

The jury heard or could properly infer the following facts. Oscar Fontalvo arrived in Puerto Rico in January 1991 to organize a scheme to smuggle cocaine into Puerto Rico. The scheme involved the drugs being flown from Colombia, airdropped into the sea at a prearranged location, picked up by a waiting boat and then sailed ashore. In drug parlance, this operation is called a "bombardeo." The waiting boat is called the "mothership." Fontalvo enlisted Pagan-San-Miguel and Jose Perez-Perez, who were to be paid in kind with 50 kilograms of cocaine. Pagan-San-Miguel introduced Fontalvo to Luis Soltero-Lopez, who agreed that his boat, the F/V Marlyn, would be used as the mothership. Soltero-Lopez recruited Jonas Castillo-Ramos to be captain, and Castillo-Ramos recruited two crew members for the drug run.

The operation was planned at a number of meetings in Puerto Rico in March 1991. Fontalvo, Pagan-San-Miguel, Perez-Perez and Soltero-Lopez attended the meetings. At least two of these meetings were at the home of Gonzalez-Valentin and, the jury could have inferred, Gonzalez-Valentin was there for at least one.

Perez-Perez brought a bag to one of the meetings at Gonzalez-Valentin's house. Pagan-San-Miguel and Perez-Perez opened the bag and showed Fontalvo and the others there (including Gonzalez-Valentin) a Colt M-16, Model A-1, 5.56 caliber fully automatic sub-machine gun with an obliterated serial number (the "M-16"). Later during the meeting, Perez-Perez brought Fontalvo over to his pick-up truck and pulled out from under the front seat an Intratec, Model TEC-9, semi-automatic .9mm pistol (the "Intratec pistol"). Referring to the weapons, Pagan-San-Miguel said they had brought them.

Communication amongst the Colombian and Puerto Rican participants, the plane, and F/V Marlyn was essential. Pagan-San-

Miguel and Fontalvo went to Miami and purchased a radio and antenna. Pagan-San-Miguel and Perez-Perez installed them on the F/V Marlyn in Puerto Rico. Code names were used for radio transmissions. The Colombian dispatcher was "Khadafi"; Pagan-San-Miguel was "Gigante" or "Padrino" or "Godfather." Fontalvo and Pagan-San-Miguel handled radio communications and set up a radio in the backyard of Gonzalez-Valentin's house, hiding it in a child's playhouse.

Soltero-Lopez, the F/V Marlyn's owner, flew to Colombia to board the plane so that during the bombardeo he could identify his boat and insure the drop was not made to the wrong boat (a not uncommon event). The F/V Marlyn went to the Dominican Republic to prepare for the airdrop. The Colombian drug owners, assigned a Colombian, Pava-Buelba, as a "load watcher" to observe the operation and report to the Colombian suppliers about the fate of the delivery. Pava-Buelba went to the Dominican Republic to meet Castillo-Ramos and the mothership.

On March 25, 1991, the F/V Marlyn and its crew left the Dominican Republic for its drug rendezvous. The Colombian load watcher, Pava-Buelba, joined the F/V Marlyn at sea after it had cleared Dominican Republic customs. The next morning, March 26, 1991, the boat and the plane made radio contact. The plane dropped eight bales of cocaine, which were taken aboard the F/V Marlyn.

Waiting in Puerto Rico, Fontalvo, Pagan-San-Miguel, Luciano-Mosquera and Gonzalez-Valentin received word that the airdrop had been successful. A call came in to Pagan-San-Miguel on a cellular phone in Luciano-Mosquera's car, warning that the operation had been discovered and that the police were watching. Pagan-San-Miguel reassured everyone, claiming he had "informants in the authorities" who would give him information and that he had a police scanner. Fontalvo went back to his cabin, leaving the others to proceed.

The F/V Marlyn anchored in Dominican Republic waters until approximately 5:30 p.m. and then began the trip to Buoy #8, the designated meeting place for the F/V Marlyn and the two smaller boats ("yawls"). Around 12:30 a.m. or 1:30 a.m. on March 27, the F/V Marlyn and the yawls, all operating without running lights in the darkness, met several miles off the western coast of

Puerto Rico at Buoy #8. The cocaine was roped down into the yawls. Pava-Buelba, Lugo-Maya, Perez-Perez and Gonzalez-Valentin sailed the yawls to Guanajibo Beach, near Mayaguez, Puerto Rico.

The landing site on Guanajibo Beach that night was immediately behind the home of Pagan-San-Miguel's father. Two men, one fitting the description of Pagan-San-Miguel, the other of Luciano-Mosquera, approached the landing yawls from the beach and helped to offload the bales of cocaine.

Law enforcement officials had indeed been silently monitoring the operation. The airdrop had been observed by U.S. Customs Service airplanes, which videotaped the mothership. Coast Guard vessels had tracked the F/V Marlyn and the yawls. Camouflaged agents, hidden on the beach, had watched the offloading. Flares went up; arrest signals were given. The conspirators scattered, leaving bales in a line from the yawls to the home of Pagan-San-Miguel's father, along the roughly five-meter wide beach.

Pagan-San-Miguel sprinted and sought refuge under an abandoned Volkswagen at a house next to the beach. When found, he was wet and had his jeans rolled up to his knees. Gonzalez-Valentin, dressed in camouflage pants and black T-shirt, completely wet and covered with sand, ran to the gate of Pagan-San-Miguel's father's house. He called out to Pagan-San-Miguel's father to open up, as the police were there. He was arrested at the gate.

Luciano-Mosquera and Pava-Buelba were found, about forty minutes after the flares went up, under a jeep parked in a carport by the building where bales of cocaine were left. Pava-Buelba was under the driver's side, Luciano Mosquera under the passenger's. Pava Buelba was wet; Luciano-Mosquera was dry.

Lugo-Maya headed to sea in one of the yawls and was intercepted by Coast Guard vessels.[1] Perez-Perez was arrested near the beach. A later search of Lugo-Maya's escape yawl found a well-hidden box of 50 rounds of ammunition. That ammunition fit the Intratec pistol, which was found in the

[1] The F/V Marlyn was not forgotten. The U.S.S. Shark, a Coast Guard vessel, intercepted it, and a boarding party led by Lt. Wendy Abrisz arrested Castillo-Ramos and the two crew members. Fontalvo was later arrested in Miami.

beached other yawl.

The M-16 was later found hidden in the undercarriage of the jeep where Luciano-Mosquera and Pava-Buelba had hidden in vain. The M-16 was on Luciano-Mosquera's side "at the place where the chass[is] and the [ ] springs of the front of the jeep are located." Two small beepers were found above the chassis on the same side where the M-16 was found. Two M-16 magazines with twenty bullets in each of them were found on the side of Pagan-San-Miguel house. The machine gun and the pistol were the same ones Pagan-San-Miguel and Perez-Perez had shown to Fontalvo earlier.

No weapons were seen during the observation of the offloading operation and no weapons were found on any of the defendants. There had been no weapons on the F/V Marlyn. Neither Luciano-Mosquera nor Pava-Buelba had arrived at the beach by the jeep. There was no evidence as to who owned the jeep or how the jeep got there.

After being given his *Miranda* warnings, Pagan-San-Miguel later bemoaned his arrest to a police officer, saying he would have been given $300,000 for his role in the deal. Instead, he was given a sentence of 60 years in prison by the court. Fontalvo and Castillo-Ramos were key government witnesses at trial.

The five appellants, Luciano-Mosquera, Lugo-Maya, Pava-Buelba, Pagan-San-Miguel and Gonzalez-Valentin, were found guilty of conspiracy to import cocaine, in violation of 21 U.S.C. §§ 960 and 963 (Count 1); importing 232.8 kilograms of cocaine, in violation of 21 U.S.C. §952 and 18 U.S.C. § 2 (aiding and abetting) (Count 2); possessing the cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count 3); and of knowingly carrying or aiding and abetting the carrying of firearms in relation to the drug trafficking crime of importing the cocaine, in violation of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2 (Counts 4 and 5).

The district court sentenced the appellants on Counts 1, 2, and 3 to terms of imprisonment ranging from 188 to 360 months and to terms of supervised release of five years. It also sentenced the appellants on Count 4, the firearms count as to the M-16, to the mandatory minimum of 360 months imprisonment, to be served

the defendants were guilty as charged." *United States v. Mena-Robles*, 4 F.3d 1026, 1031 (1st Cir.1993), *cert. denied sub nom. Rivera v. United States*,__U.S.__,114 S.Ct. 1550, 128 L.Ed.2d 199 (1994).

The facts of this case do not require use to define the precise contours of the meaning Congress intended the phrase "carries" to have, and we note the variety of views on both that issue and the meaning of its companion term "use" in 18 U.S.C. § 924(c)(1). *See generally United States v. Joseph*, 892 F.2d 118, 126 (D.C.Cir.1989) (to prove carrying, the government must show that the defendant had the ability to exercise dominion and control over the firearm and that the firearm was within easy reach to protect the defendant during the drug trafficking offense); *United States v. Evans*, 888 F.2d 891, 895 (D.C.Cir.1989) (carrying comprehends more than actually physically wearing or bearing a gun on one's person), *cert. denied sub nom. Curren v. United States*, 494 U.S. 1019, 110 S.Ct. 1325, 108 L.Ed. 2d 500 (1990); *see also United States v. Bailey*, 36 F.3d 106, 125 (D.C.Cir.1994) (Williams, J., dissenting) (stating that carrying included situations (1) where a weapon was within easy reach of the defendant, (2) where a defendant had sufficient control over confederates carrying weapons to establish constructive possession, or (3) where a defendant had transported a weapon by motor vehicle and had ready access to the weapon as if it were in his pocket), *cert. granted*, ___U.S.___, 115 S.Ct. 1689, 131 L.Ed.2d 554 (1995); *Bailey*, 36 F.3d 106 at 114-15 & n. 1 (stating that what constitutes "use" depends upon the nature of the underlying substantive offense); *United States v. Paulino*, 13 F.3d 20, 26 (1st Cir.1994) (focusing on whether the firearm was available for use in connection with the narcotics trade). Suffice it to say that actual physical carrying of the gun comes within the scope of the statute. *See Joseph*, 892 F.2d at 126.

The conclusion is reasonable that at least one Puerto Rico based participant in the drug conspiracy physically carried the M-16 to the beach. The M-16 had been at Gonzalez-Valentin's house a few days before the beach landing. It was then found in the undercarriage of the jeep in a carport near the beach, next to a building entryway where bales of cocaine had been brought. Someone brought it from Gonzalez-Valentin's house to the jeep. The fact that the jeep was not otherwise connected to the defendants suggests that sometime before the arrest, the gun was

consecutively to the terms of imprisonment imposed on Counts 1, 2, and 3. The court dismissed Count 5, the Intratec pistol count out of double jeopardy concerns.[2] It also ordered a special assessment of $50 for each of Counts 1-4.

I. CONVICTION ISSUES

A. *Sufficiency of the Evidence*

1. *Count 4, the M-16 Firearm Count.*

Appellants' principal focus is on the denial of their Rule 29 motions at trial for acquittal on Count 4, the M-16 firearm count. Each appellant claims that there was insufficient evidence to support his conviction under Count 4 for carrying, or aiding and abetting the carrying of, the M-16 during and in relation to the drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2(a). Section 924(c)(1) provides, in pertinent

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2 At oral argument a question arose as to whether the district court had in fact dismissed Count 5 or had simply not sentenced on that count. We asked the government to inform us as to the disposition of the convictions for Count 5. In its response, the government represented that Count 5 had not been dismissed and that the district court had simply not sentenced on that count. Our own review of the docket sheet, however, reveals plainly an order dismissing Count 5, which the government acknowledged when the court called the order to counsel's attention. We take a dim view of the government's conduct in this matter, even if it is viewed as nothing more than negligence.

The government now claims that, in any event, the order dismissing Count 5 is a nullity because the order was entered on the docket a few days after each appellant had filed his notice of appeal. Pointing out that as a general rule the entry of a notice of appeal divests the district court of jurisdiction to adjudicate any matters related to the appeal, see United States v. Distasio, 820 F.2d 20, 23 (1st Cir.1987), the government argues that the entry of the notices of appeal divested the district court of jurisdiction over the case and that the, absent jurisdiction, the order on Count 5 can have no effect.

But the government forgets that a criminal judgment involving multiple counts is not final and appealable unless the record discloses the precise disposition (e.g., the sentence) for each count. See United States v. Wilson, 440 F.2d 1103 (5th Cir.) (no final judgment where the court imposed sentence on three counts of a six count indictment and withheld sentence on three counts) (cited with approval in 15B Charles A Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure §3918.7 & n. 10 (2d ed.1992), *cert denied*, 404 U.S. 882, 92 S.Ct. 210, 30 L.Ed.2d 163 (1971). The district court

[Footnote continued]

part:

> Whoever, during and in relation to any...drug trafficking crime ... uses or carries a firearm, shall, in addition to the punishment provided for such ... drug trafficking crime, be sentenced to imprisonment for five years, ... and if the firearm is a machine gun ... to imprisonment for thirty years....

18 U.S.C. § 924(c)(1). Section 2(a) provides:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a).

The standard of review for sufficiency of the evidence is familiar. "Our task is to review the record to determine whether the evidence and reasonable inferences therefrom, taken as a whole and in the light most favorable to the prosecution, would allow a rational jury to determine beyond a reasonable doubt that the defendants were guilty as charged." United States v. Mena-Robles, 4 F.3d 1026, 1031 (1st Cir.1993), cert. denied sub nom. Rivera v. United States, ___U.S.___, 114 S.Ct. 1550, 128 L.Ed.2d 199 (1994).

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here had not specified the disposition of Count 5 by the time the notices of appeal were docketed. Absent a disposition on Count 5, there was no final judgment from which the defendants could appeal. Because there was no appealable order at the time the notices were filed, the notices of appeal could not have divested the district court of its jurisdiction over the case. Accordingly, the district court had jurisdiction and its order dismissing Count 5 was not a nullity.

That the notices were premature does not affect the court's jurisdiction of these appeals. The notices simply relate forward to the entry of judgment. See Fed.R.App.P.4(b); ct. *Yockey v. Horn*, 880 F.2d 945, 948 n.4 (7th Cir.1989) (where district court inadvertently failed to dismiss one count of a multi-count complaint, notice of appeal that was technically premature related forward after district court entered an order officially dismissing the remaining count). The notices of appeal are treated as if they were filed on the date the order dismissing Count 5 was entered on the docket.

Count 5 is no longer at issue in this case. The government did not cross-appeal from the dismissal, nor has it requested reversal of the dismissal of Count 5.

The facts of this case do not require use to define the precise contours of the meaning Congress intended the phrase "carries" to have, and we note the variety of views on both that issue and the meaning of its companion term "use" in 18 U.S.C. § 924(c)(1). *See generally United States v. Joseph*, 892 F.2d 118, 126 (D.C.Cir.1989) (to prove carrying, the government must show that the defendant had the ability to exercise dominion and control over the firearm and that the firearm was within easy reach to protect the defendant during the drug trafficking offense); *United States v. Evans*, 888 F.2d 891, 895 (D.C.Cir.1989) (carrying comprehends more than actually physically wearing or bearing a gun on one's person), *cert. denied sub nom. Curren v. United States*, 494 U.S. 1019, 110 S.Ct. 1325, 108 L.Ed. 2d 500 (1990); *see also United States v. Bailey*, 36 F.3d 106, 125 (D.C.Cir.1994) (Williams, J., dissenting) (stating that carrying included situations (1) where a weapon was within easy reach of the defendant, (2) where a defendant had sufficient control over confederates carrying weapons to establish constructive possession, or (3) where a defendant had transported a weapon by motor vehicle and had ready access to the weapon as if it were in his pocket), *cert. granted*, ___U.S.___, 115 S.Ct. 1689, 131 L.Ed.2d 554 (1995); *Bailey*, 36 F.3d 106 at 114-15 & n. 1 (stating that what constitutes "use" depends upon the nature of the underlying substantive offense); *United States v. Paulino*, 13 F.3d 20, 26 (1st Cir.1994) (focusing on whether the firearm was available for use in connection with the narcotics trade). Suffice it to say that actual physical carrying of the gun comes within the scope of the statute. *See Joseph*, 892 F.2d at 126.

The conclusion is reasonable that at least one Puerto Rico based participant in the drug conspiracy physically carried the M-16 to the beach. The M-16 had been at Gonzalez-Valentin's house a few days before the beach landing. It was then found in the undercarriage of the jeep in a carport near the beach, next to a building entryway where bales of cocaine had been brought. Someone brought it from Gonzalez-Valentin's house to the jeep. The fact that the jeep was not otherwise connected to the defendants suggests that sometime before the arrest, the gun was somewhere on the beach and was then brought from the beach and placed under the jeep to avoid detection. That the bullets for the machine gun were found behind Pagan-San-Miguel's house near the bales of cocaine further supports the inference that the gun was either carried onto the beach during the offloading or

was nearby as part of the operation. Still, the gun was not found in the hands of anyone at the beach and there is no direct evidence as to who carried the gun. None of the agents watching the offloading saw anyone with a weapon of any kind.

Our initial focus then is on the sufficiency of the evidence on the aiding and abetting charge. Aiding and abetting requires that "the defendant [have] associated himself with the venture, participated in it as in something he wished to bring about, and sought, by his actions to make it succeed." *United States v. Alvarez*, 987 F.2d 77, 83 (1st Cir.), *cert. denied*, ___U.S.___,114 S.Ct. 147, 126 L.Ed.2d 109 (1993). Mere association with the principal, or mere presence at the scene of a crime, even when combined with knowledge that a crime will be committed, is not sufficient to establish aiding and abetting liability. *Id.; see also United States v. de la Cruz-Paulino*, 61 F.3d 986 (1st Cir.1995). The defendant must have taken some affirmative action that facilitated violation of § 924(c)(1).[3] Of course, knowledge that a gun would be carried is also required. *See United States v. Torres-Maldonado*, 14 F.3d 95, 103 (1st Cir.), *cert. denied*,___U.S.___, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994); *see also United States v. DeMasi*, 40 F.3d 1306, 1316 (1st Cir.1994) (knowledge that co-conspirators would be using a gun may be inferred from defendant's activity in planning and attempting to rob a Brink's armored truck guarded by two armed guards), *cert. denied sub nom. Bonasia v. United States*, ___U.S.___. 115 S.Ct. 947, 130 L.Ed.2d 890 (1995).

The question here, then, is whether the evidence was sufficient to show that each appellant knew that a firearm would be involved in the drug trafficking offense and took some action in relation to the M-16 that was intended to cause the firearm to be carried during and in relation to the drug trafficking offense. We believe that the evidence was sufficient to convict Pagan-San-

[3] A *Pinkerton* instruction was never given to the jury, nor did the government argue at trial or on appeal that *Pinkerton* liability should apply. *See Pinkerton v. United States*, 328 U.S. 640, 646-47, 66 S.Ct. 1180, 1184, 90 L.Ed. 1489 (1946). We therefore could not support the convictions on a *Pinkerton* theory. *See United States v. Torres-Maldonado*, 14 F.3d 95, 101 (1st Cir.) ("On appeal, we will not infer either that the jury found guilt based on a theory upon which it was not instructed, or that the jury would have found guilt had it been given a *Pinkerton* instruction."). *cert. denied*, ___U.S.___115 S.Ct. 193, 130 L.Ed.2d 125 (1994).

Miguel, Luciano-Mosquera and Gonzalez-Valentin under this standard, but was not sufficient to convict Pava-Buelba and Lugo-Maya as to the M-16.

As to Pagan-San-Miguel, there was sufficient evidence that he knowingly assisted the carrying of the weapon. He was the ringleader of the importation operation in Puerto Rico. He was a key participant in the meeting at Gonzalez-Valentin's house during which he and Perez-Perez showed Fontalvo the M-16. He showed Fontalvo the weapon at the meeting and said they had brought it. The jury could certainly infer that he, or Perez-Perez at his direction or with his assistance, procured the M-16 for purposes of using it to protect the operation.

The evidence is also sufficient to show that Gonzalez-Valentin knowingly assisted the carrying of the weapon. Gonzalez-Valentin is chargeable with knowledge of the M-16, since the M-16 was displayed in his presence during one of the meetings at his house and the jury could infer that he was present. Moreover, by providing his house for the meeting at which the guns were displayed and discussed, Gonzalez-Valentin assisted the substantive § 924(c)(1) offense.

As for Luciano-Mosquera, when viewed in the light most favorable to the government, the evidence was sufficient for the jury to infer that he either carried or aided in carrying the weapon to or from the beach and hid the M-16 under the jeep at the time he hid or had placed it there sometime before the arrests. The weapon was directly above him in the undercarriage, no more than an arm's span away. It was also placed up in the undercarriage between the chassis and the springs, so clearly someone took some effort to place the weapon there. He was at the beach with Pagan-San-Miguel to meet the yawls; he arrived at the beach with Pagan-San-Miguel, who supplied the weapon; magazines from the M-16 were nearby; beepers were found near the gun (suggesting a connection between the gun and the drug offense); and the call tipping the conspirators off that the police were watching came into a car phone in his car. This evidence supports the reasonable inference that his proximity to the weapon was more than a mere fortuity. A jury could conclude from these circumstances that Luciano-Mosquera either placed the weapon in the jeep before the arrest signals were given or that he carried the weapon from the beach and hid it underneath the jeep

as he was hiding from the police. From these circumstances, a jury could reasonably conclude that Luciano-Mosquera had carried the weapon sometime during and in relation to the offense or at least that he aided in the carrying of the weapon during and in relation to the drug offense. *See United States v. Olbres*, 61 F.3d 967, 974 (1st Cir.1995) (evidence must be taken as a whole, in cumulation).

All of the appellants have argued that, regardless of whether the evidence was sufficient to show aiding and abetting "carrying," it was insufficient to show that any carrying was done "during and in relation to" the drug importation offense. They argue that, because their importation efforts ended the moment the flares went up, the subsequently found M-16 machine gun could not have "related to" the drug trafficking. That argument is inventive, but wrong. The jury could easily infer from the discovery of the weapon in close proximity to the offloading operation after the arrest signals were given that it had been carried at a time when the offense was in progress, particularly in light of the evidence that it was brought by the conspirators to a planning meeting and shown off, ammunition for it was found nearby, and it was found close to the bales of cocaine. Further, the legislative history of the 1984 amendment to § 924(c) is explicit that where the defendant had a gun during the underlying offense (even if the gun had not been displayed), the section is violated "if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape." S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314 n. 10 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492 n. 10; *see also United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir.1988).

In sum, the evidence was sufficient to convict Pagan-San-Miguel, Gonzalez-Valentin and Luciano-Mosquera of carrying the M-16 on an aiding and abetting theory. Their convictions on Count 4 are, therefore, affirmed.

The evidence as to Lugo-Maya and Pava-Buelba, however, was insufficient to sustain a conviction on Count 4. The only evidence the government presented linking Lugo-Maya to the M-16 was the evidence that 50 rounds of .9mm ammunition for the Intratec pistol were found in the yawls. Evidence of his involvement with the Intratec pistol might have been enough to show knowledge of the M-16 on the inference that the two firearms were together

when the Puerto Rico-based participants met to launch the yawls to the F/V Marlyn, and that knowledge of one supports the inference of knowledge of the other. There was no evidence, however showing that he took any step to assist the carrying of the M-16 in relation to the drug offense. Lugo-Maya was not at the meeting where the M-16 was shown. The government presented no evidence that Lugo-Maya took any steps to procure or otherwise supply the weapons or ammunition. He was also nowhere near the weapon at the time of his arrest. There was simply insufficient evidence to show beyond a reasonable doubt that he either carried or aided and abetted the carrying of the M-16.

The government's only evidence connecting Pava-Buelba to the M-16 was the fact that he was found under the jeep in which the M-16 had been hidden. Unlike Luciano-Mosquera, however, Pava-Buelba was on the opposite side of the jeep from where the M-16 was found. Given the darkness and the fact that the gun was stuck up between the chassis and the springs it is not reasonable to infer that Pava-Buelba saw the weapon when he was under the jeep. And also unlike Luciano-Mosquera, there was no evidence linking him to the activities in Puerto Rico, specifically the activities on the beach on the evening of the arrest from which it would be reasonable to infer the requisite-knowledge of the weapon before he hid under the jeep. Indeed, Fontalvo's testimony never associated Pava-Buelba with any weapons. Pava-Buelba was simply a load watcher whose job it was to observe and report back to the Colombian supplier about whether the cocaine was successfully delivered. His interests were not the same as the interests of the Puerto Rico-based importers. The first time he set foot in Puerto Rico in connection with this case was when he arrived at the offloading site in one of the yawls. There was no evidence linking him to the Puerto Rico end of the operation where he would have been in a position to know about the specific weapon. Therefore, the inference that he knew about the weapon is much weaker than the inference with respect to Luciano-Mosquera. Moreover, even if there were evidence sufficient to infer that he saw the hidden weapon in the darkness once he crawled under the jeep, given his disconnection with the Puerto Rico side of the operation, such knowledge would have been mere fortuity. Unlike Luciano-Mosquera, who was found directly beneath the weapon and had substantial dealings with Pagan-San-Miguel during the hours before the arrest, there is

insufficient evidence to conclude beyond a reasonable doubt that Pava-Buelba hid under the jeep to be next to the M-16 with the idea that he would carry it. In short, the government did not present evidence that Pava-Buelba knew about the weapon sufficient to support a § 924(c) conviction, even on an aiding and abetting theory.

Furthermore, there was no evidence that Pava-Buelba ever had actual possession of the weapon. With Luciano-Mosquera lying underneath the gun, it is far from clear that Pava-Buelba was in a position to exercise dominion and control over the weapon. Even if his proximity to the M-16 under the jeep gave him sufficient possession, at most, a theory of constructive possession might have been argued. In this case, however, the district court specifically instructed the jury that a conviction for "carrying" a firearm could not be based on constructive possession of the firearm. Such an instruction sets the benchmark against which the sufficiency of the evidence must be measured. *United States v. Gomes*, 969 F.2d 1290, 1294 (1st Cir.1992); *United States v. Angiulo*, 897 F.2d 1169, 1196-97 (1st Cir.) (appellate determination of sufficiency must be constrained by trial court's instructions; "otherwise ... we would be sustaining a conviction on appeal on a theory upon which the jury was not instructed below"), *cert. denied*, 498 U.S. 845, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990). While the correctness of that instruction might otherwise be open to question, the government did not object to the instruction at trial nor does it argue on appeal that the instruction was error. See Saylor v. Cornelius, 845 F.2d 1401, 1408 (6th Cir.1988) (although reversal due to a trial error normally does not raise double jeopardy concerns, double jeopardy bar would be triggered where government had failed to object to the error).

Issues of the sufficiency of the evidence necessarily involve the tension between deference to the jury's role under the Sixth Amendment as the finder of fact, *see Olbres*, 61 F.3d at 974-75, and the appellate court's role in providing meaningful review of whether the government has indeed met its burden of proof of guilt beyond a reasonable doubt. That burden is constitutionally mandated. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The Supreme Court has said that the relevant question is whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed. 560 (1979) (emphasis removed). The difficulty of these questions of sufficiency of the evidence to draw reasonable inferences is illustrated in the case law. *See, e.g., Stewart v. Coalter*, 48 F.3d 610 (1st Cir.) (each of four courts reviewing a conviction reach different conclusions as to sufficency, culminating in a split decision by a panel of this court upholding the conviction), *petition for cert. filed*, No. 94-9742 (U.S. June 19, 1995).

In sum, we believe there was insufficient evidence, in light of the government's burden of proof, to convict either Lugo-Maya or Pava-Buelba of carrying or aiding and abetting the carrying of the M-16 and so reverse their convictions on Count 4. There is no direct evidence as to either and an insufficient basis to draw inferences of guilt beyond a reasonable doubt.

2. *Drug Counts.*

Gonzalez-Valentin and Luciano-Mosquera also raise sufficiency challenges on the drug counts. As the facts above amply demonstrate, there was overwhelming evidence of each appellant's complicity in the scheme to import the cocaine and of their guilt on the drug counts. Their convictions on the drug counts are affirmed.

B. Other Issues Going To The Verdict

The appellants[4] --principally Pagan-San-Miguel--have raised six other claims of error concerning the district court's conduct of the trial: (1) the limitation of Pagan-San-Miguel's cross-examination of two government witnesses, (2) the admission of an incriminating statement made by Pagan-San-Miguel, (3) the refusal to grant a mistrial after allegedly improper remarks were made during closing statements, (4) the jury instruction on § 924(c)(1), (5) the jury instruction on the defendants' flight from the crime scene, and (6) the allowance of a read-back of

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[4] Appellants Gonzalez-Valentin and Pava-Buelba have incorporated all arguments made by the other appellants not inconsistent with those otherwise made in their briefs. Our review of the issues applies therefore to their appeals as well.

testimony by a government witness to the jury during its deliberation. None of these claims of error provides a ground for reversal.

1. *Cross-Examination.*

Pagan-San-Miguel complains that the district court erred in cutting off his cross-examination into the penalties Castillo-Ramos would have faced on firearms counts which were dropped against him. Pagan-San-Miguel attempted to establish bias by showing that the government had been able to procure Castillo-Ramos' cooperation by deciding not to charge Castillo-Ramos under the firearms counts in the second superseding indictment. After questioning on this topic, Pagan-San-Miguel asked Castillo-Ramos whether his attorney had informed him that if he had been "found guilty of the possession of the firearm during the commission of a drug offense [he would be] sentenced to thirty-five years in addition to the drug offense." The district court sustained an objection to this question on the ground that, because defendants faced the same firearms charges, it was an impermissible attempt to inform the jury about the defendants' possible punishment on the firearms counts.

Pagan-San-Miguel claims that this truncating of his cross-examination impermissibly interfered with his right to confrontation under the Sixth Amendment. We disagree. Pagan-San-Miguel had a sufficient opportunity to expose potential biases including any bias resulting from any benefit Castillo-Ramos received as a result of his cooperation. Pagan-San-Miguel was able to ask Castillo-Ramos repeatedly whether he had received a benefit for his testimony. Any probative value of information about the precise number of years Castillo-Ramos would have faced had he been charged for the firearms offense was slight. The district court properly decided that the value of the information was outweighed by the potential for prejudice by having the jury learn what penalties the defendants were facing.

Although cross-examination is an important component of a defendant's Sixth Amendment rights under the confrontation clause, a defendant's right to cross-examine witnesses is not unlimited. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). A district court is entitled to cut off cross-examination that may create prejudice or

confusion of the issues, or may be harassing or unduly repetitive. *Id.* Assuming that the minimal constitutional threshold level of inquiry was allowed, as here, a trial court has discretion in limiting cross-examination. A trial court does not abuse its discretion if there is sufficient evidence before the jury (absent the excluded evidence) from which the jury could "make a discriminating appraisal of the possible biases and motivations of the witnesses." Brown v. Powell, 975 F.2d 1, 5 (1st Cir.1992), cert. dismissed,___U.S___, 113 S.Ct. 1035, 122 L.Ed.2d 179 (1993). That was the case here.

2. Pagan-San-Miguel's Incriminating Statement.

Pagan-San-Miguel argues that the district court erred by not conducting a hearing out of the jury's presence, pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), and 18 U.S.C. § 3501(a),[8] to determine the voluntariness of his incriminating statements. Police Officer Samuel Jusino testified that Pagan-San-Miguel, while being held following his arrest, told Jusino that he "would make three hundred thousand dollars out of [the drug venture]" and, once the arrest signals were given, "that he ran and hid himself underneath a metal plank, and if he had found a hole he would have gone through that place."

Before the issue of a *Jackson v. Denno* hearing may be raised on appeal, the issue of voluntariness must have been placed before the district court in a timely and coherent manner. See *United States v. Santiago Soto*, 871 F.2d 200, 201 (1st Cir.) (failure to raise the issue of voluntariness in a way that would have alerted the trial judge that a *Jackson v. Denno* hearing was desirable waives right to hearing), cert. denied, 493 U.S. 831, 110 S.Ct. 103, 107 L.Ed.2d 66 (1989); *see also United States v. Berry*, 977 F.2d 915, 918 (5th Cir.1992) (a generic objection to the admissibility of the confession was insufficient to put the court on notice that defendant sought a Jackson v. Denno hearing and therefore the court's ruling was reviewed for plain error). Pagan-San-Miguel failed to place the issue properly before the trial court here.

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[8] Section 3501(a) provides, in pertinent part, that "[b]efore such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness." 18 U.S.C. § 3501(a).

Pagan-San-Miguel did not specifically object to the admissibility of the statements on voluntariness grounds. He never specifically requested a voluntariness hearing during trial. He never raised the voluntariness issue in his pre-trial motion to suppress statement made to law enforcement personnel. He never raised voluntariness in his objection to the statement at trial. His objection was a narrow foundational one not going to voluntariness--that at the time of Officer Jusino's testimony no one had yet testified that *Miranda* warnings had been given to Pagan-San-Miguel before he made the incriminating statements. The court specifically asked Pagan-San-Miguel whether his objection as to foundation was a suppression request and Pagan-San-Miguel informed the court that it was not. Indeed during the

colloquy with the district court over the testimony, Pagan-San-Miguel conceded that "there [was] evidence that [Miranda] warnings were properly made and there was a waiver." Given his disclaimer that he was seeking suppression of the statement and the total absence of any evidence that the statements were made involuntarily, Pagan-San-Miguel did not sufficiently apprise the district court that voluntariness was an issue. Thus, Pagan-San-Miguel's claim to a *Jackson v. Denno* hearing has been waived.

There also is no colorable claim here that the district court was nevertheless obliged to hold a voluntariness hearing *sua sponte*. *See Santiago Soto*, 871 F.2d at 202 (recognizing, without adopting, a rule that such a hearing must be given *sua sponte* under circumstances, "such as a defendant's apparent abnormal mental or physical condition, obvious ignorance or lack of awareness," raising a serious question over voluntariness). At best, Pagan-San-Miguel's argument is that he was so "shell-shocked" by the events that transpired on the beach that the court must have been alerted to the possibility that he did not understand the Miranda warnings that were given to him and that, as a result, his statements made hours later were involuntary. Undoubtedly a defendant who suddenly becomes aware the police are on to him suffers a jolt, but that jolt does not incapacity make.

3. *Remarks During Closing Arguments.*

Pagan-San-Miguel argues that certain remarks made during to closing arguments were unduly prejudicial. He points to four remarks, one made by the attorney for Pava-Buelba and three

made by the government. None provides a basis for reversal.

Pava-Buelba's attorney, in an apparent effort to distinguish his client and to distinguish the firearms charges from the drug charges, made the following remarks to the jury:

I ask you to please keep in mind that the fact that there are a number of defendants here [-does] not mean that they were all to be treated as one. And the fact that they were being charged with five different counts does not mean that you had to find them guilty of innocent or all the same, but that you could choose and pick. And that you could discern among the evidence and determine which, if any, were guilty of any of the counts charged.

Some might be guilty of one or more. Some might be guilty of none. And I ask you to please be careful watching the evidence so that you will be able to distinguish between each and every individual and each and every count.

Pagan-San-Miguel objected to these remarks, arguing they implied that Pava-Buelba was guilty of the drug offenses and thus implicated the other defendants. The district court sustained the objection. Pagan-San-Miguel's later motion for a mistrial was denied, but the court offered to provide a curative instruction, which all defendants declined. Pagan-San-Miguel argues that a curative instruction would have been pointless and that the district court abused its discretion in refusing to grant a new trial.

Fatal to Pagan-San-Miguel's claim, however, is that to "require a new trial, we must conclude... that, despite the instruction, the misconduct was likely to have affected the trial's outcome." *United States v. Capone*, 683 F.2d 582, 585-86 (1st Cir.1982) (internal citations omitted). In the context of the full record, these statements could not have had any impact o the outcome of the trial. The evidence of Pagan-San-Miguel's complicity on the drug counts was overwhelming. Moreover, a curative instruction would have solved any spillover problem created by the statements.

Pagan-San-Miguel also challenges the government's statement that "Carlos Pagan-San-Miguel can't deny his association with [Fontalvo], that terrible, terrible person that was described to you." Pagan-San-Miguel argues this was an impermissible

comment from a prosecutor on an accused's failure to testify. We think it was not. The government did not say that Pagan-San-Miguel "didn't deny his association," only that he "can't deny his association." Even assuming that this comment cut too close to the line, 'there is no reason to conclude that the prosecutor intentionally drew attention to the appellant's silence at trial." *United States v. Taylor*, 54 F.3d 967, 980 (1st Cir.1995). and the evidence was otherwise so overwhelming that his comment could have had no effect on the jury's judgment. *Id.* at 977.

Pagan-San-Miguel's next two challenges are to the government's statements that the firearm found under the jeep "would be used to protect the very cocaine that was being illegally smuggled into Puerto Rico" and that "Carlos Pagan-San-Miguel bragged about having bought the firearms." Pagan-San-Miguel argues that the first was misleading in that it suggested that the jury could convict the defendant for planning on using the firearm once it had arrived in Puerto Rico, an offense not charged in the indictment. Pagan-San-Miguel's reading is strained, at best. The first statement was consistent with the evidence and the government's theory. There is no plausible argument that this statement was likely to have affected the outcome of the trial or was so egregious that a new trial is needed as a sanction. *See Capone*, 683 F.2d at 587. While the second statement appears to have exaggerated the evidence, there was no objection and it does not amount to plain error. *See Taylor*, 54 F.3d at 977.

4. *Jury Instruction on 18 U.S.C. §924(c)(1).*

Pagan-San-Miguel argues that the court erroneously instructed the jury on an essential element of the firearms offense, 18 U.S.C. § 924(c)(1). That section requires that the defendant have carried the firearm "during and in relation to ...[a] drug trafficking crime." The district court, however, instructed the jury that it was enough if the defendant knowingly carried the firearm "during the commission of the crime of drug trafficking."
In so doing, the district court appears to have relied on obsolete statutory language. Before 1984, § 924(c)(1) provided that it was a crime to carry a firearm "during the commission of any [federal] felony." In 1984, however, Congress amended the language adding the phrase "during and in relation to," to make clear that the firearm must be linked to the underlying felony to come within the scope of the statute. S.Rep. No. 225, *supra*, at

312-13, *reprinted in* 1984 U.S.C.C.A.N. at 3490-92.

Because Pagan-San-Miguel did not object to the instruction, the instruction is reviewed for plain error. *See* Fed.R.Crim.P. 52(b). Pagan-San-Miguel argues that the court's use of the phrase "during the commission of" was plain error, claiming it omitted an essential element of the offense and it broadened the scope of the conduct under which the jury could convict.

The actual charge given here undercuts Pagan-San-Miguel's argument.[6] The district court emphasized that the carrying of the firearm must be linked to the specific underlying drug offense for which the defendants were convicted:

> First, it must be proven that a[ ] defendant[ ] committed *a crime of drug trafficking* for which he may be prosecuted in the United States. And second, that during the commission of *the crime of drug trafficking* the defendant[ ] knowingly carried a firearm.

In light of the actual instruction given, Pagan-San-Miguel's attack on the instruction does not rise to the level of plain error.

Pagan-San-Miguel also argues that the instruction allowed the jury to convict for a crime not charged in the indictment because the firearms charge was limited to Count 2 of the three drug counts. Pagan-San-Miguel has not and cannot articulate how, in the context of this case, such a possibility created a "miscarriage of justice" or "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings". *See United States v. Olano*, __U.S.___,___, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993).

5. *Jury Instruction on Flight.*

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[6] Faced with a similar challenge the Ninth Circuit has held that the change in statutory language was not substantive and that the requirement that the firearm be linked to the crime was already implicit in the statute. "Though the legislative history does not say so expressly, it strongly implies that the 'in relation to' language did not alter the scope of the statute, explaining that the original section was directed at persons who chose to carry a firearm as an offensive weapon for a specific criminal act." United States v. Stewart, 779 F.2d 538, 539 -40 (9th Cir.1985) (internal quotation omitted), cert. denied, 484 U.S. 867, 108 S.Ct. 192, 98 L.Ed.2d 144 (1987).

Pagan-San-Miguel also argues that the district court erroneously instructed the jury about his flight and concealment. This argument is meritless. As long as there is an adequate factual predicate supporting an inference of guilt on the crime charged, as there was here, evidence of the accused's flight may be admitted at trial to show consciousness of guilt. *See United States v. Hernandez-Bermudez*, 857 F.2d 50, 52 (1st Cir.1988).

6. *Read-Back To The Jury.*

Pagan-San-Miguel and Luciano-Mosquera assert that the district court committed error when it failed to take certain precautions in allowing the testimony of Castillo-Ramos, the boat captain, to be read back to the jury at the jury's request, during deliberations. Counsel did not object to the procedures followed; in fact, what happened was by agreement among counsel.[7] To prevail, defendants must show plain error.

It certainly would have been preferable for the district court to have taken some precautions. *See, e.g., United States v. Hernandez*, 27 F.3d 1403, 1408-09 (9th Cir.1994) (reversing a conviction where district court failed to take precautions to prevent undue emphasis on the witness testimony that jury reviewed during deliberation), *cert. denied*, ___U.S___, 115 S.Ct. 1147, 130 L.Ed.2d 1106 (1995). But counsel did not object and the standard set in *Olano* is not met. In light of the overwhelming evidence of guilt on the drug counts to which Castillo-Ramos' testimony went, the read-back did not result in a miscarriage of justice nor did the absence of such precautions seriously affect the fairness, integrity or public reputation of judicial proceedings. There is no evidence that anything untoward happened in the jury

[7] The court reporter entered the jury room unsupervised and read the testimony. The court gave the jury no cautionary instructions (i.e., that the testimony was not to substitute for the jurors' memories, or that the jury should not focus on one particular aspect of the evidence to the exclusion of other evidence). There was no observation of the court reporter's reading of the testimony to ensure that no editorializing or slanting was done during the reading. No instructions were given to the court reporter to be careful not to converse with the jurors or otherwise taint their deliberations and to be careful not to read to the jury potentially prejudicial side-bar conferences she had recorded during the course of Castillo-Ramos' testimony.

room and no reason to think the reporter did anything other than properly read the pertinent portions of the record.

Pagan-San-Miguel and Luciano-Mosquera also argue they were never consulted by either of their attorneys or the court about whether they would waive their right to be present during the read-back. Although the defendant's right to be present at every stage of the proceedings may be waived by the defendant, it is less clear whether the defendant's attorney can waive it. *See Taylor v. Illinois*, 484 U.S. 400, 418 & n.24, 108 S.Ct. 646, 658 & n.24, 98 L.Ed.2d 798 (1988). Nevertheless, Pagan-San-Miguel and Luciano-Mosquera were present at the time Castillo-Ramos actually gave his testimony and so could "confront" their accuser. There was no plain error.

III. SENTENCING ISSUES

A. *Pagan-San-Miguel*

Pagan-San-Miguel challenges his sentence on two grounds, neither of which has merit. He asserts he should not have been given a four level increase as a leader or organizer of the activity under § 3B1.1(a) of the Sentencing Guidelines. *See* United States Sentencing Commission, *Guidelines Manual*, § 3B1.1(a) (Nov. 1991). He also argues he should have been given a downward adjustment of two levels for acceptance of responsibility under U.S.S.G. § 3E1.1(a). Absent a mistake of law, the district court's determination of a defendant's role may be set aside only for clear error. *United States v. Tejada-Beltran*, 50 F.3d 105, 111 (1st Cir. 1995). There was no error.

The facts outlined earlier establish Pagan-San-Miguel's leadership and organizational role. Fontalvo testified that Pagan-San-Miguel was "the land person in charge of all the merchandise." Indeed, his code names in the operation were "Gigante," "Padrino," and "Godfather." Pagan-San-Miguel's argument that the court made no specific finding that at least four others were under his leadership and control does not help him. It was obvious that nine others, at the least, were involved in addition to Pagan-San-Miguel. And "retention of control over other participants ... is not an essential attribute of organizer status." *Tejada-Beltran*, 50 F.3d at 113.

As to acceptance of responsibility, "the determination of the sentencing judge is entitled to great deference on review." U.S.S.G. § 3E1.1, comment. (n. 5). The fact that Pagan-San-Miguel in pre-trial plea bargaining unsuccessfully offered to plead guilty to the drug counts if certain conditions were met does not provide a sufficient basis to reverse the district court's decision. "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, comment. (n. 2). His argument is not enough to reverse the district court's determination that he failed to "demonstrate[] a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. § 3E1.1(a); *see also United States v. Curran*, 967 F.2d 5, 7 (1st Cir.1992).

B. Gonzalez-Valentin

Gonzalez-Valentin argues he was a minor participant and thus entitled to a two level reduction under U.S.S.G. § 3B1.2(b). The trial judge's determination was not clearly erroneous. *See United States v. Lopez-Gil*, 965 F.2d 1124, 1131 (1st Cir.), *cert. denied*, ___U.S.___, 113 S.Ct. 484, 121 L.Ed.2d (1992).

Gonzalez-Valentin was at the beach to assist in the offloading; his house was used regularly to plan the drug smuggling; weapons were shown and discussed at his house; a communications radio was hidden and used in his backyard. There was ample evidence he was more culpable than the average participant. *See* U.S.S.G. § 3B1.2, comment. (backg'd.).

C. *Lugo-Maya*

In addition to the mandatory sentence of 30 years on Count 4, Lugo-Maya was sentenced under the Guidelines on the drug counts, Counts 1-3. Lugo-Maya challenges on appeal the district court's calculation of his guidelines sentence on the drug counts. He argues the court erred in not giving him two-level reductions each for being a minor participant pursuant to U.S.S.G. § 3B1.2(b), and for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a). As the district court properly found, Lugo-Maya was not a minor participant--he supplied the yawls, sailed one out to the mothership, helped to unload the drugs from the

boat, sailed the drugs to shore and helped unload them to the land. As to acceptance of responsibility, Lugo-Maya's claim is factbound, and the district court's resolution of it is not clearly erroneous. *See United States v. Royer*, 895 F.2d 28, 29 (1st Cir.1990). His sentence on the drug counts is affirmed.

IV. SECTION 2255 MOTION ISSUES

While these consolidated appeals were pending, Pagan-San-Miguel filed in the district court a motion under 28 U.S.C. § 2255 to vacate and set aside his conviction on the ground that the court reporter's delay in providing him with a transcript denied him his right to a timely appeal and, therefore, deprived him of due process of law.[8]

The district court denied the motion.[9] On appeal, Pagan-San-Miguel argues that this was error.

Although extreme delay in the processing of an appeal may amount to a due process violation, and delays caused by court reporters are attributable to the government for purposes of determining whether a defendant has been deprived of due process, *see, e.g., United States v. Wilson*, 16 F.3d 1027, 1030

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[8] Pagan-San-Miguel filed his notice of appeal on August 3, 1992. Around that time, the court reporter agreed to furnish the necessary transcripts to Pagan-San-Miguel. The court reporter, however, did not provide any transcripts to Pagan-San-Miguel until mid-1994. Largely due to the court reporter's failure to prepare the transcripts, this court extended the period for briefing the case sixteen times. On at least three occasions this court entered Orders to Show Cause threatening the court reporter with contempt if she did not produce the transcripts.

[9] We have held that absent extraordinary circumstances a district court should not entertain a § 2255 motion while a direct appeal from the same conviction is still pending. United States v. Gordon, 634 F.2d 638 (1st Cir.1980). Nevertheless, instead of dismissing Pagan San-Miguel's motion as being premature, the district court denied the motion. In such a case, we may elect to reach the merits of the § 2255 motion. See United States v. Buckley, 847 F2d. 991, 993 n. 1, 1000 n. 6 (1st Cir.1988), cert. denied, 488 U.S. 1015, 109 S.Ct. 808, 102 L.Ed.2d. 798 (1989); see also Rule 5, Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code, advisory committee note (1976).

(9th Cir.1994), mere delay, in and of itself will not give rise to a due process infraction. The defendant must show prejudice. *See United States v. Tucker*, 8 F.3d 673, 676-77 (9th Cir.1993) (en banc), *cert. denied*, ___U.S.___, 114 S.Ct. 1230, 127 L.Ed.2d 574 (1994). Whether an appellate delay results in prejudice sufficient to warrant reversing a conviction rests, most importantly, on a showing that it has impaired the appeal of the defense in the event of retrial. *See id.* at 676.

There was no prejudice. Although there was an appalling delay in preparing the transcripts, there is no argument they are in complete or unreliable. This is not a situation in which the court reporter has prepared an unusable transcript. *Compare Wilson*, 16 F.3d at 1031 (record had portion missing or was unintelligible so that record was totally unreliable). Indeed, Pagan-San-Miguel only argues that the delay impaired his ability to present "the strongest possible evidence in support of the appellant's version of the facts" surrounding the read-back of Castillo-Ramos' testimony to the jury. As Pagan-San-Miguel concedes, however,

no objection was made to the district court's handling of the read-back. And since Pagan-San-Miguel has not shown plain error in this regard, this argument does not make a difference to his appeal.[10]

The order of the district court denying his § 2255 motion is affirmed.

CONCLUSION

The convictions and sentences of appellants Luciano-Mosquera, Pagan-San-Miguel, and Gonzalez-Valentin are affirmed on all counts. The convictions of Lugo-Maya and Pava-Buelba are reversed on Count 4 and their sentences on that count are vacated. Lugo-Maya's and Pava-Buelba's convictions and sentences on the drug counts, Counts 1-3, are affirmed. The district court's order denying Pagan-San-Miguel's § 2255 motion is affirmed. *It is so ordered.*

[10] Alternatively, Pagan-San-Miguel requests that we set aside his conviction pursuant to our supervisory powers. This is not an appropriate case for this court to exercise its supervisory powers. See Tucker, 8 F.3d at 676.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1973
No. 94-1657

UNITED STATES,
Appellee,

v.

CARLOS PAGAN SAN MIGUEL,
Defendant-Appellant.

BEFORE

TORRUELLA, Chief Judge,
SELYA, CYR, BOUDIN, STAHL AND LYNCH,
Circuit Judges

ORDER OF COURT

Entered: November 29, 1995

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
FRANCIS P. SCIGLIANO, Clerk

Oscar Fontalvo-Testimony-Trial - 3/13/92 Pp.13 - 16 and 24

BY MR. MORALES:
Q Mr. Montalvo, at any time during this venture did you see weapons?
A Yes, sir.
Q Can you tell us more or less when you saw weapons?
A I -- Well, the original plan was that "Pucho" would get on the boat. And originally when the boat arrived in port and the weapons we were at Mr. Chins' house. And in the

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living room you saw "Pucho" come with a package. A bag of some kind. some kind of a bag. And they opened it and I saw it in a case. And I saw it.
Q What kind of weapon was it?
A Like a submission gun. Mr. Carlos Pagan showed it to me. And I told them--showed it to me and then they showed it to me. Later I saw it. And then later "Pucho" came over to the red pick-up.
Q Excuse me. Mr. Montalvo, what red pick up? Where was this?
A It was a Toyota pick-up.
Q Please go on. What happened?
A From underneath of the driver seat he pulled out that other weapon. He brought it with him. Some sort of pistol but it was long.
Q Now, sir you say something that you were in Chin's house, is that correct?
A Yes. In the living room in Chins house.
Q Who was there?
A Mr. Carlos Pagan, "Pucho" and myself. And there is another person but I don't remember well who it was. I know there was another person but I don't remember. Right now, I wouldn't be able to assure his name.
Q Now, sir, this person " Chin" does he have a name?

P.15
A Well, I just know him as "Chin ". I don't know his name.
Q Do you see "Chin" in Court today?
A Yes, sir. The first one that is there on the bench.
Q Could you please describe what he's wearing and exactly where he's seated?

A He's wearing a stripe shirt, green/black/purpose stripes with white.
Q And where is he seated?
A The first one on the seat from here to here (indicating).
Q When you say here, what do you mean?
A From my position. From left to right.

MR. MORALES: Your Honor, let the record reflect that the witness has identified as "Chin" Mr. Edgar Gonzalez Valentin.
THE COURT: Yes.
MR. MORALES: Your Honor, at this time the United States requests that the witness be shown Government Exhibits 18 abd 25.
THE COURT: It will be shown.

BY MR. MORALES:
Q Sir, I would ask you to examine Governments Exhibits 18 and 25. Let me know when you're ready to proceed.
A (Complied.) Yes, I've seen them.

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Q Mr. Montalvo, have you ever seen similar weapons?
A Yes. These weapons are the ones that I saw there at "Chin's" house. The ones that "Pucho" brought.
Q Now, what, if anything, at Chins' house that day were you told about these weapons?

MR. MENDEZ: Your Honor, may we approach the bench?
THE WITNESS: Mr. Carlos Pagan told me that they brought them....
(Colloquy Omitted)

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MR. MORALES: I would request that Government Exhibits 18 and 25 be retrieved from the witness.
THE COURT: It will be withdrawn.
(Whereupon, Government Exhibits 18 and 25 were withdrawn.)
MR. MORALES: May I proceed, your Honor.
THE COURT: Yes, you may.

Trial Court's Charge To Jury As To The Weapons Count.
(TT 3/19/92, pp. 35 - 36)

"Members of the jury, now we reach the allegations of Counts Four and Five. And I shall explain to you the essential elements that have to be proven beyond a reasonable doubt in order to establish the offenses charged in Counts Four and Five of the indictment which refer to Section 924(c)(1). First, it must be proven that defendants committed a crime of drug trafficking for which he may be prosecuted in a United States Court. And second, that during the commission of the crime of drug trafficking the defendants knowingly carried a firearm. I will now define for you the essential element of knowingly carrying a firearm in the commission of the drug trafficking offense. That is one of the essential elements that must be proven beyond a reasonable doubt as to the two weapons charges. Members of the jury, to prove that a defendant knowingly carried a firearm in the commission of a narcotics offense, as charged in Counts Four and Five of the superseding indictment, the government's evidence must establish at a minimum the firearm was within the possession or control of the defendant. The government's evidence must establish beyond a reasonable doubt that the firearm was accessible or available to the defendant. The weapon need not be within the defendant's reach. A firearm may be considered available if its physical proximity to the defendant during the commission of a crime supports the inference that it emboldened him to commit the drug offense. You are therefore instructed that you are to consider the evidence as to each individual defendant, separately and independently and determine first whether each particular defendant knowingly committed narcotics offense, and then whether each particular defendant knowingly carried the firearms as charged in Counts Four and Five in the manner that the Court has just defined." Emphasis added.

CONSTITUTIONAL PROVISIONS AND STATUTES

A. United States Constitution.

(1) Amendment V

"...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;..."

(2) Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him;..."

B. Relevant Portions of Federal Statutes cited.

(1) 18 U.S.C. §924(c) Prior To The 1984 And 1986 Amendments:

(c) Whoever

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years.

(2) 18 U.S.C. §924(c)(1): Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a machine gun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years....Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the

term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(3) 18 U.S.C. §2(b): Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(4) 21 U.S.C. §841(a): "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance:..."

(5) 21 U.S.C. §952: "(a) It shall be unlawful...to import into the United States from any place outside thereof,...any controlled substance in Schedules I and II of Subchapter I of this chapter..."

(6) 21 U.S.C. §960(a): "Any person who...(1) contrary to Sections 952, 953 or 957 of this title, knowingly and intentionally imports...a controlled substance...shall be punished as provided in subsection (b) of this section...."

(7) 21 U.S.C. §963: Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(8) Fed.R.Crim.P., Rule 52(b): Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

(9) Fed.R.Crim.P., Rule 43(a): "...the defendant shall be present...at every stage of the trial...except as otherwise provided by this rule.

(10) Fed.R.App.P. Rule 10(e): "...If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation...may direct that the omission or misstatement be corrected...."

(A) Stipulation pursuant to Fed.R.App., 10(e)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff,	:	
v.	:	CRIMINAL NO. 91-170 (CC)
CARLOS PAGAN SAN MIGUEL, Defendant.	:	

STIPULATION FOR THE PURPOSE OF INCLUDING A MATTER THAT WAS OMITTED FROM THE RECORD PURSUANT TO Fed.R.App.P.,10(e)

IT IS HEREBY STIPULATED AND AGREED by and between the United States of America and the defendant, Carlos Pagan San Miguel, through his undersigned attorney as follows:

1. That during deliberations on March 19, 1992 at 7:15 PM, the jury requested by written note: "the transcript of witness Jonas Castillo Ramos".

2. The judge then summoned all of the defense and government lawyers and held an off-the-record conference in the absence of the defendants. The note was read to the lawyers and after discussion, the Court decided, without objection from any of the lawyers and with their concurrence, that the testimony of Jonas Castillo Ramos be read back to the jury by the Court Reporter in the jury deliberating room in the absence of the defendants, their attorneys, the government attorneys and the Court.

3. The Court responded to the juror's request in writing as

follows: "The courtroom reporter shall read to you the testimony of Mr. Jonas Castillo Ramos".

4. The Court Reporter then entered the jury deliberating room in the absence of the Judge, the attorneys for the government, the defendants on trial and their respective attorneys, and, upon information and belief, as recorded on Page 53 line 22 of the transcript of the trial proceedings for March 19, 1992, read the testimony of Jonas Castillo Ramos to the jurors.

RESPECTFULLY SUBMITTED.

In Brooklyn, New York, this 5th day of October of 1994.

Carlos Pagan San Miguel
Defendant, by his attorney

Frank A. Ortiz

In San Juan, Puerto Rico, this 28th day of October, 1994.

Epifanio Morales Cruz
Assistant U.S. Attorney

Jeannette Mercado Rios
Assistant U.S. Attorney

(B) Affidavit of Trial Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff,	:	
v.	:	CRIMINAL NO. 91-170 (CC)
CARLOS PAGAN SAN MIGUEL, Defendant.	:	AFFIDAVIT

TEODORO MENDEZ LEBRON, being duly sworn, deposes and says:

I am an attorney at law of the Commonwealth of Puerto Rico, with offices located at 605 Condado Avenue, Santurce, Puerto Rico.

I was the trial attorney for Carlos Pagan San Miguel in the captioned case.

I have read the Stipulation entered into between the United States and Carlos Pagan San Miguel through his attorney, dated October 5, 1994, and based upon my best recollection, I believe that the facts therein stated are true and accurate.

Furthermore, I have no recollection of having discussed the issue of the read-back of the Jonas Castillo Ramos testimony with Mr. Pagan before the testimony was read to the jury.

Teodoro Mendez Lebron

AFFIDAVIT NO: 5206

Municipality of San Juan
Commonwealth of Puerto Rico

On this 7th day of October, 1994 before me came Teodoro Mendez Lebron to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

Notary Public